Supreme Court, U.S.
FILED

109 D 08-545 OCT 23 2008

OFFICE OF THE CLERK

No. 08

IN THE

Supreme Court of the United States

BRYANT LAWSON, *ET AL.*,

Petitioners,

v.

BERETTA USA CORPORATION, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

JONATHAN E. LOWY
BRIAN J. SIEBEL
DANIEL R. VICE
BRADY CENTER TO PREVENT GUN VIOLENCE LEGAL ACTION PROJECT
1225 EYE STREET, N.W.
SUITE 1100
WASHINGTON, DC 20005
(202) 289-7319

ROBERT S. PECK*
VALERIE M. NANNERY
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
777 Sixth Street, N.W.
Suite 520
Washington, DC 20001
(202) 944-2874
robert.peck@cclfirm.com

*Counsel of Record

QUESTION PRESENTED

The Question Presented is:

May Congress, relying solely on its Commerce Clause power, retroactively eliminate a claim for money damages that has already accrued under applicable local law without providing any remedy or offsetting benefits for the harms suffered by the plaintiffs?

PARTIES TO THE PROCEEDINGS

Petitioners are Bryant Lawson, James Foster-el, Michelle Foster-el, Patrick Mahoney, Laura Wallace, Madilia R. Marsh-Williams, Ahmad Vaughan, Avery Blue and Gregory Ferguson.

Respondents are Beretta U.S.A. Corp., Beemiller, Inc. d/b/a Hi-Point Firearms, B.L. Jennings, Inc., Browning Arms Co., Bryco Arms, Century International Arms, Inc., Colt's Manufacturing Co. LLC, Fabbrica d'Armi Pietro Beretta S.p.A., Forjas Taurus, S.A., Glock Ges.m.b.H., Glock, Inc., Heckler & Koch, Inc., Heckler & Koch GmbH, H&R 1761, Inc., K.B.I., Inc., Phoenix Arms, Sigarms, Inc., Smith & Wesson Corp., Sturm Ruger & Co., Inc., Taurus International Manufacturing, Inc., as well as the District of Columbia, which was a co-plaintiff below.

Respondent-Intervener is the United States of America.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

INTRODUCTION 2

STATEMENT OF THE CASE 3

A. The Statutory Scheme 3

B. Proceedings Below 5

REASONS FOR GRANTING THE PETITION 8

I. RETROACTIVE ELIMINATION OF CLAIMS UNDER COMMERCE CLAUSE AUTHORITY IS UNCONSTITUTIONAL 10

II. RETROACTIVE ELIMINATION OF CLAIMS WITHOUT AN ALTERNATIVE REMEDY OR OFFSETTING BENEFITS VIOLATES DUE PROCESS 15

III. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND THE FEDERAL CIRCUIT COURTS IN HOLDING THAT CONGRESS'S CHOICES PROVIDE ALL THE PROCESS THAT IS DUE IN RETROSPECTIVE ECONOMIC LEGISLATION 21

CONCLUSION 23

APPENDIX

APPENDIX A: Opinion of the District of Columbia Court of Appeals (January 10, 2008) . 1a

APPENDIX B: Judgment of the Superior Court of the District of Columbia, Civil Division (May 22, 2006) 37a

APPENDIX C: Memorandum Opinion and Order of the Superior Court of the District of Columbia, Civil Division (May 22, 2006) 38a

APPENDIX D: Opinion of the District of Columbia Court of Appeals (April 21, 2005) 82a

APPENDIX E: Opinion of the Superior Court of the District of Columbia (December 16, 2002) 134a

APPENDIX F: ORDER of the District of Columbia Court of Appeals (June 9, 2008) 255a

APPENDIX G: U.S. Const. art. I § 8 ..... 257a

APPENDIX H: U.S. Const. amend. V 258a

APPENDIX I: 15 U.S.C. §§ 7901-7903.....259a

APPENDIX J: D.C. Code. § 7-2551 .....269a

TABLE OF AUTHORITIES

Cases

Austin v. Abney Mills, Inc., 824 So. 2d 1137 (La. 2002) 17

Barrick v. District of Columbia, 173 A.2d 372 (D.C. 1961), *aff'd sub nom. Swenson v. Barrick*, 302 F.2d 927 (D.C. Cir. 1962) 8

Berry v. Beech Aircraft Corp., 717 P.2d 670 (Utah 1985) 18

Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988) 10

Carr v. United States, 422 F.2d 1007 (4th Cir. 1970) 16

City of New York v. Beretta U.S.A. Corp., 524 F.3d 384 (2d Cir. 2008) 3

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 11, 14

Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602 (1993) 22

Connecticut Department of Public Safety v. Doe, 538 U.S. 1 (2003) 22

Coombes v. Getz, 285 U.S. 434 (1932) 20

Dash v. Van Kleeck, 7 Johns. 477 (N.Y. 1811) 22

District of Columbia v. Beretta U.S.A. Corp., 872 A.2d 633 (D.C.), *cert. denied*, 126 S.Ct. 399 (2005) 6

District of Columbia v. Beretta U.S.A. Corp., 940 A.2d 163 (2008) 1

District of Columbia v. Beretta U.S.A. Corp., No. Civ. A. 0428-00, 2002 WL 31811717 (D.C. Super. Ct. Dec. 16, 2002) 6

Ducharme v. Merrill-National Laboratories, 574 F.2d 1307 (5th Cir.), *cert. denied*, 439 U.S. 1002 (1978) 19

Duke Power v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978) 15, 16

Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) 10, 12, 21

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) 14

Ettor v. City of Tacoma, 228 U.S. 148 (1913) 20

Gadda v. State Bar of California, 511 F.3d 933 (9th Cir. 2007) 22

General Motors Corp. v. Romein, 503 U.S. 181 (1992) 12, 22

Gibson v. Commonwealth of Pennsylvania, 415 A.2d 80 (Pa. 1980) 18

Gregory v. Ashcroft, 501 U.S. 452 (1991) 14

Hawkeye Commodity Promotions, Inc. v. Vilsack, 486 F.3d 430 (8th Cir. 2007) 23

Highland Farms Dairy v. Agnew, 300 U.S. 608 (1937) 13

Ileto v. Glock, Inc., 421 F. Supp. 2d 1274 (C.D. Cal. 2006) 7

Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827 (1990) 12

Keller v. Dravo Corp., 441 F.2d 1239 (5th Cir. 1971) 16

Kt & G Corp v. Attorney General of the State of Oklahoma, 535 F.3d 1114 (10th Cir. 2008) 23

Landgraf v. USI Film Products, 511 U.S. 244 (1994) ..... passim

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 19

Martinez v. California, 444 U.S. 277(1980) 19

Miller v. Florida, 482 U.S. 423 (1987) 10

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) 14

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 19

Munn v. Illinois, 94 U.S. 113 (1876) 18

New York Central Railroad Co. v. White, 243 U.S. 188 (1917) 16, 19

Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984) 11, 22

Phillips Petroleum Corp., v. Shutts, 472 U.S. 797 (1985)..... 19

Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) 17

Resolution Trust Corp. v. Fleischer, 892 P.2d 497 (Kan. 1995)..... 17

Smothers v. Gresham Transfer Co., 23 P.3d 333 (Or. 2001) 17

Sprint Communications. Co., L.P. v. APCC Services, Inc., 128 S.Ct. 2531 (2008)..... 20

Thorp v. Casey's General Stores, Inc., 446 N.W.2d 457 (Iowa 1989) 17

Truax v. Corrigan, 257 U.S. 312 (1921)..... 17, 18, 19

Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478 (1988) 19

United States v. Carlton, 512 U.S. 26 (1994) 22

United States v. Hemme, 476 U.S. 558 (1986) 22

United States v. Klein, 80 U.S. 128 (1871) 7

United States v. Munsey Trust Co., 332 U.S. 234 (1947) 20

United States v. Sperry Corp., 493 U.S. 52 (1989) 22

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) 21, 22, 23

Statutes

PLCAA, 15 U.S.C. §§ 7901-7903 ..... 3, 14

15 U.S.C § 7901(a)(7) 4, 5, 13

15 U.S.C § 7901(a)(8) 5, 13, 14

15 U.S.C § 7901(b)(1) 4

15 U.S.C. § 7902(a) 3

15 U.S.C. § 7902(b) 3

15 U.S.C. § 7903(5)(A) 4

15 U.S.C. § 7903(5)(A)(iii) 4, 13

28 U.S.C. § 1257(a) 1

D.C. Code Ann. §§ 7-2551.01-7-2551.03 6

Other Authorities

H.R. REP. NO. 109–124 ..... 5, 13

Hochman, Charles B., *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692 (1960) 11

Peck, Robert S. and Vail, John, *Blame it on the Bee Gees: The Attack on Trial Lawyers and Civil Justice*, 51 N.Y.L. SCH. L. REV. 323 (2006) 20

THE FEDERALIST No. 44, at 301 (James Madison) (J. Cooke ed. 1961) 9, 11

PETITION FOR A WRIT OF CERTIORARI

Petitioners Bryant Lawson *et al.* respectfully petition for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals in this case.

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals (App., *infra*, 1a-36a) is reported at 940 A.2d 163. The judgment of the District of Columbia Superior Court (App. *infra*, 37a-81a) is unreported.

JURISDICTION

The District of Columbia Court of Appeals rendered judgment on January 10, 2008. Rehearing was denied on June 9, 2008. On September 2, 2008 the Chief Justice granted Petitioners' Application (08A185) to extend the time to file this Petition until October 23, 2008. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provision of the Commerce Clause and of the Fifth Amendment to the United States Constitution are reproduced at App. G-H, *infra*, 257a-258a.

The Protection of Lawful Commerce in Arms Act (PLCAA), 15 U.S.C. §§ 7901-7903, is reproduced at App. I, *infra*, 259a.

The District of Columbia's Assault Weapons Manufacturing Strict Liability Act of 1990 ("Strict

Liability Act"), D.C. Code Ann. §§ 7-2551.01-7-2551.03, is reproduced at App. J, *infra*, 269a.

INTRODUCTION

This case involves the constitutionality of a federal statute that purports to preempt otherwise valid state causes of action that provide money-damage remedies against Respondents, who are manufacturers, importers, and distributors of machine guns and other weapons that inflict great harm on innocent people. Petitioners claim that this statute violates the Constitution because it has three features that make it unique and unconstitutional: (1) it totally eliminates rights and remedies held by Petitioners, but provides no benefit of any kind—even prospective—for those whose rights are eliminated; (2) the statute is retroactive and thus eliminates claims, such as those of Petitioners, that had been filed years before the statute became law and that cover wrongful acts of Respondents that occurred long before the statute's effective date; and (3) it derives its authority solely from the power of Congress "to Regulate commerce . . . among the several States," even though a legislative body cannot "Regulate commerce" with respect to transactions that were completed before the legislation was enacted.

This petition specifically seeks review of a decision by the District of Columbia Court of Appeals upholding the constitutionality of the Protection of Lawful Commerce in Arms Act (PLCAA), Pub. L. No.

109-92, 119 Stat. 2096 (2005) (codified at 15 U.S.C. §§ 7901 to 7903.[1]

In arguing to sustain the PLCAA in this case, Respondents and the United States, as well as the lower courts, relied on cases that upheld statutes that have some of the elements of this law, but none of which have the unusual combination of characteristics that makes this law unconstitutional. Because of the devastating consequences that this law has on the pre-existing rights of Petitioners and others who are similarly situated, and because the law goes far beyond any statute previously upheld by this Court, the Court should grant review and set aside the judgment of dismissal entered below.

STATEMENT OF THE CASE

A. The Statutory Scheme

The PLCAA orders every court, state or federal, to "immediately dismiss" any "qualified civil liability action" (hereafter, "Qualified Action") pending on the date of enactment, and to bar the courthouse doors to all future Qualified Actions. 15 U.S.C. § 7902(a), (b). A Qualified Action is defined as any proceeding brought

---

[1] A decision upholding the constitutionality of the same Act was rendered by the U.S. Court of Appeals for the Second Circuit in *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008). That decision is the subject of a Petition for a Writ of Certiorari filed on or about October 20, 2008. The issues raised in that petition are different from those raised in this Petition.

> against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party[.]

15 U.S.C. § 7903(5)(A)).

The PLCAA further states that certain categories of proceedings are not Qualified Actions, including, significantly, actions that allege that the "manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product," a limitation known as the predicate exception. *Id.* at § 7903(5)(A)(iii); App. 264a-65a. None of those exceptions are available in this case as a result of the ruling below.

The PLCAA states as its operative purpose the prohibition of causes of action against firearms companies and trade groups "for the harm *solely caused*" by criminal or unlawful misuse of guns or ammunition, when the product functioned as intended. *Id.* at § 7901(b)(1) (emphasis added). In findings supporting the act, however, Congress made plain the concern it was addressing. In its view, certain liability actions against gun manufacturers and dealers "are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law." *Id.* at § 7901(a)(7). To Congress, such actions could only be sustained by a "maverick judicial officer or

petit jury [and] would expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States." *Id.* Thus, the PLCAA represents a federal attempt to prevent plaintiffs in pending actions relying on state law from "us[ing] the judicial branch to circumvent the Legislative branch." *Id.* at § 7901(a)(8). Moreover, because Congress believed it was merely vindicating what it considered to be a proper interpretation of existing state law, it stated that the Act "makes no changes to preexisting law." H.R. REP. NO. 109–124, at 41.

B. Proceedings Below

This lawsuit was originally brought on January 20, 2000, by nine individuals injured by gun violence or personal representatives of individuals killed by assault weapons or machine guns in the District of Columbia. Plaintiff Bryant Lawson was rendered a quadriplegic after being shot by two assailants who were using a machine gun. Plaintiffs Ahmad Vaughan, Avery Blue, and Gregory Ferguson were shot and injured in front of the Vaughan home. Personal representatives in this case are making claims for Helen Foster-el, who was killed in a gun battle while trying to shield neighborhood children from the gunfire, Mary Caitrin Mahoney, who was killed while working at a Starbucks coffee shop in Georgetown, and high schools seniors Andre Wallace and Natasha Marsh, killed while unloading groceries in the Marsh driveway. The case was consolidated with a similar action brought by the District of Columbia itself.

The Complaint alleged that Plaintiffs' injuries were not solely caused by the criminals who shot

them, but that Respondents, who are firearms manufacturers, importers, and distributors, were negligent, created a public nuisance by their marketing and distribution systems, and were liable under the District of Columbia's Assault Weapons Manufacturing Strict Liability Act of 1990 ("Strict Liability Act"), for injuries inflicted within the District. *See* D.C. Code Ann. §§ 7-2551.01 to 7-2551.03. The trial court granted Defendants' Motion for Judgment on the Pleadings and dismissed the action in its entirety. *District of Columbia v. Beretta U.S.A. Corp.*, No. Civ. A. 0428-00, 2002 WL 31811717 (D.C. Super. Ct. Dec. 16, 2002), App. 81a.

On appeal, the Court of Appeals, sitting *en banc*, upheld the trial court with respect to Plaintiffs' negligence and public nuisance claims, but reversed her decision as to the claims under the Strict Liability Act, permitting those to go forth. *See District of Columbia v. Beretta U.S.A. Corp.*, 872 A.2d 633 (D.C.), *cert. denied*, 126 S.Ct 399 (2005), App 83a. The case was remanded for further trial proceedings.

On October 26, 2005, the President signed the PLCAA into law. The following day, Defendants filed a Motion for Judgment on the Pleadings, asking the court to dismiss the remaining claim pursuant to the PLCAA. On May 22, 2006, the trial court dismissed the case with prejudice and rejected Plaintiffs' arguments that the action either fit within an exception to the PLCAA's dismissal mandate or, alternatively, that the statute was unconstitutional. App. 81a.

The Court of Appeals affirmed. First, it rejected Petitioners' argument that claims under the

District's Strict Liability Act fit within the PLCAA's predicate exception. App. 7a-8a. The Court of Appeals also rejected Petitioners' constitutional challenge to the PLCAA. Finding that Congress had set "new standards that must be met before a case may be brought or a pending one may proceed," the court held that the PLCAA imposed no rule of decision and therefore did not exhibit the separation-of-powers flaw this Court identified in *United States v. Klein*, 80 U.S. 128 (1871). App. 17a-18a.

With respect to Petitioners' Due Process claim, the court ruled that the PLCAA was within Congress's power to "'adjust[ ] the burdens and benefits of economic life,'" and the deference owed economic legislation is undiminished "'when that legislation is applied retroactively.'" App. 18a, 19a, (citations and quotations omitted). The court added that, even if the PLCAA impaired substantive rights, there was no bar to applying the new law to pending cases nor any persuasive argument that "Congress acted arbitrarily or irrationally." App. 19a. The court agreed with a California federal district court decision that "'[a]lthough one may disagree with Congress's predictions' about the effect on commerce of unchecked lawsuits of that kind, 'one cannot credibly argue that the Act's retroactive provision does not further a legitimate legislative purpose.'" App. 20a, quoting *Ileto v. Glock, Inc.*, 421 F. Supp. 2d 1274, 1302 (C.D. Cal. 2006).

Asserting that the law of "retroactivity in civil matters" has changed, the court overturned its own precedent that would have recognized that the PLCAA operated retroactively and thus impermissibly foreclosed Petitioners' preexisting action. App. 29a-30a (overruling *Barrick v. District of*

Columbia, 173 A.2d 372 (D.C. 1961), *aff'd sub nom. Swenson v. Barrick*, 302 F.2d 927 (D.C. Cir. 1962)). The court concluded that Petitioners "received 'all the process that is due,' when Congress barred pending actions such as theirs from proceeding." App. 26a (citations omitted).

Finally, the court rejected Petitioners' argument that the PLCAA's immediate-dismissal requirement constituted an unconstitutional taking without just compensation. App. 36a. In its analysis, the court relied heavily on the availability of causes of action under the exceptions contained within the PLCAA, even though the court acknowledged that "Congress unmistakably took away the specific cause of action the plaintiffs have alleged" and that the availability of alternative theories of liability will be "small comfort to them." App. 35a.

REASONS FOR GRANTING THE PETITION

Although this Court has explained that "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment," *Landgraf v. USI Film Products*, 511 U.S. 244, 269 (1994), a constitutionally cognizable problem with retroactive application occurs when "the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 269-70. This case raises that important issue: whether Congress may use its Commerce Clause authority to regulate transactions that took place years before Congress acted. If the decision below is left unreviewed, Congress would be encouraged to assume authority to grant special exemptions from pending liability actions imposed by state law and involving past conduct. James Madison

warned against such an arrogation of legislative power. THE FEDERALIST No. 44, p. 301 (J. Cooke ed. 1961) (contrary to "every principle of sound legislation," "changes and legislative interferences, in cases affecting personal rights, [will] become jobs in the hands of enterprising and influential speculators."). He further admonished that, "one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding." *Id.*

The PLCAA, as construed by the Court of Appeals, requires dismissal of a lawsuit filed eight years ago by innocent victims of Respondents' assault weapons and machine guns. By requiring immediate dismissal of an action filed in 2000 and involving conduct taking place before that year, the 2005 Act purports to regulate past commercial activity, a concept far outside temporal limitations that even Congress cannot override. At the same time, the legislative scheme is not a legitimate exercise of Congress's Commerce Clause authority, as limiting liability to prospectively authorized statutory actions, rather than those found pursuant to extant common-law authority. No proper Commerce Clause purpose is served by the PLCAA's posture that allows Congress to impose its view of the law retroactively to liability for actions completed long before enactment.

In addition, this case presents a question that has bedeviled this Court and other courts for nearly a century: when Congress eliminates an existing cause of action, must it provide some alternative remedy or offsetting benefit? Never before has this Court approved a statute such as the PLCAA which utterly

deprives a certain class of litigants in pending actions of any civil remedy. Finally, the decision below rests, in part, on a narrow reading of judicial authority to analyze the due-process and retroactivity implications of "economic legislation," a view that is in conflict with decisions of this Court and various circuit courts. The Court of Appeals held that courts owe complete deference to Congress's choices because the very act of approving economic legislation constitutes "all the process that is due." Such an approach, long rejected by this Court, renders the most essential constitutional protection, Substantive Due Process, a hollow promise and raises precisely the types of concerns that animated the Framers to insulate judicial decision making from legislative interference.

I. RETROACTIVE ELIMINATION OF CLAIMS UNDER COMMERCE CLAUSE AUTHORITY IS UNCONSTITUTIONAL

Without doubt, by eliminating claims for past actions, the PLCAA constitutes a retroactive law. *See Miller v. Florida*, 482 U.S. 423, 430 (1987) ("a law is retrospective if it changes the legal consequences of acts completed before its effective date.") (quotation omitted) (citation omitted). This Court has frequently acknowledged and even cataloged the disfavor and distrust that accompanies retroactive statutes. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in the law."). *See also Eastern Enters. v. Apfel*, 524 U.S. 498, 532-33 (1998) (plurality); *id.* at 547-48 (Kennedy, J., concurring in judgment, dissenting in part); *Landgraf v. USI Film Products*, 511 U.S. 244 (1994).

Laws that apply to past conduct are often the product of a "tempt[ation] to use retroactive legislation as a means of retribution against unpopular groups or individuals," *id.* at 266, or, with much the same effect, a means of favoritism for popular or powerful groups or individuals. Either result can arise from the legislature's "responsivity to political pressures" and its "unmatched powers to allow it to sweep away settled expectations suddenly and without individualized consideration." *Id.* As Madison warned, permitting retroactive laws invites the "influential" to "speculat[e] on public measures." *Id.* at 267, quoting THE FEDERALIST NO. 44, p. 301 (J. Cooke ed. 1961). This danger that retroactive legislation will provide special benefits for the powerful is especially great because such laws are "'passed with an exact knowledge of who will benefit from it.'" *Id.*, quoting Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation,* 73 HARV. L. REV. 692, 693 (1960).

This Court has generally overruled constitutional objections to retroactive statutes only when "confined to short and limited periods required by the practicalities of producing national legislation." *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.,* 467 U.S. 717, 731 (1984). Here, the practicalities of producing national legislation could not have impelled Congress to prohibit both future Qualified Actions, as well as the handful of pending actions related to past conduct. Making the PLCAA prospective would have satisfied any legitimate Commerce Clause purpose Congress might have had. *Cf. Richmond v. J.A. Croson Co.,* 488 U.S. 469, 514 (1989) (Stevens, J., concurring in part and concurring in judgment) ("Legislatures are primarily

policymaking bodies that *promulgate rules to govern future conduct.*") (emphasis added).

Still, this Court has also acknowledged that even practical considerations supporting retroactive treatment are overcome when legislation "imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience." *Apfel,* 524 U.S. at 528-29. The retroactivity injunction must operate evenhandedly. If severe retroactive liability on a limited class unsettles expectations unconstitutionally, then it must be equally true that severe retroactive immunity affecting a limited class of parties and unsettling expectations must also be null and void.

Just as "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly," *Landgraf,* 511 U.S. at 265, the "legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." *Id.,* quoting *Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 494 U.S. 827, 855 (1990) (Scalia, J., concurring). The PLCAA upsets that time-tested principle. No legitimate purpose is served by absolving Respondents from liability for their past behavior and depriving Petitioners of their legal protections, doggedly pursued over the past eight years, well *after the fact.* Such a readjustment of the consequences of past behavior strikes at notions of fairness that are at the root of our justice system. *See General Motors Corp. v. Romein,* 503 U.S. 181, 191 (1992) ("Retroactive legislation presents problems of unfairness that are

more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions.").

Perhaps more critically, Congress, through its findings, detailed motivations that highlight the irrationality of the PLCAA's enactment. While "mak[ing] no changes to preexisting law," H.R. Rep. No. 109–124, at 41, and supposedly aimed at fixing the system of separation of powers that it viewed as having become unsettled in the states,[2] 15 U.S.C. § 7901(a)(8), Congress dictated that actions approved by judges as consistent with local law be dismissed, while identical actions authorized by certain legislative acts remain valid. *Compare* 15 U.S.C. § 7901(a)(7) (liability actions against gun manufacturers and dealers "are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law") *with id.* at § 7903(5)(A)(iii) (permitting actions based on a knowing violation of "a State or Federal statute applicable to the sale or marketing of the product").

No Commerce Clause purpose can be imagined from the distinction Congress drew between the disfavor it heaped upon common-law actions

---

[2] Of course, in our system of sovereign States, Congress has no authority to insist on its vision of separated powers. *See Highland Farms Dairy v. Agnew*, 300 U.S. 608, 612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself.").

applicable to the sale or marketing of firearms and the deference it exhibited for statutory-based actions aimed at the same conduct. *Cf. Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("Congress has no power to declare the substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts."). Instead, the distinction drawn by Congress supports the conclusion that the PLCAA is arbitrary and irrational.

Beyond Congress's lack of authority to restructure state government, *see Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991), or to determine which branch of state government can make the law of the state, *see Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 (1981), Congress had it wrong when it thought it had the power to prevent plaintiffs from "us[ing] the judicial branch to circumvent the Legislative branch" without state legislative approval. *Id.* at § 7901(a)(8). In attempting to exercise that authority pursuant to the Commerce power, Congress acted irrationally. After all, "[i]t is the judicial system, rather than the legislative process, that is best equipped to identify past wrongdoers and to fashion remedies that will create the conditions that presumably would have existed had no wrong been committed." *Landgraf*, 511 U.S. at 267 n.20, quoting *J.A. Croson*, 488 U.S. 469, 513-14 (Stevens, J., concurring in part and concurring in judgment).

It is clear that Congress's purpose in enacting the PLCAA, to prevent a "maverick judge or petit jury" from allowing civil liability to be assessed against a firearms manufacturer, dealer, or importer, without legislative blessing, cannot supply a legitimate justification for the exercise of Commerce Clause

authority to require "immediate dismissal" of pending actions based on conduct that significantly predated enactment of PLCAA. The issue is one of great national importance and is appropriate for this Court's review.

II. RETROACTIVE ELIMINATION OF CLAIMS WITHOUT AN ALTERNATIVE REMEDY OR OFFSETTING BENEFITS VIOLATES DUE PROCESS

In *Duke Power v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), this Court left unresolved whether Due Process requires Congress to "either duplicate the recovery at common law or provide a reasonable substitute remedy," when it supplants a common-law cause of action. *Id.* at 88. The issue arose in a challenge to the constitutionality of the Price-Anderson Act, through which Congress sought to bolster the development of nuclear power by establishing a $560 million fund per incident to satisfy claims for compensation following a nuclear accident. This Court found it unnecessary to determine whether a just substitute was required because it found that the Price-Anderson Act actually did "provide a reasonably just substitute for the common-law or state tort law remedies it replaces." *Id.* In so holding, the Court said that the law provided a sufficient *quid pro quo* by requiring the nuclear power industry to waive all defenses, thus becoming subject to strict liability, and by substituting Congress as a guarantor against liability in excess of the $560 million ceiling. *Id.* at 65, 66-67, 85-87.

On those rare occasions when Congress has abolished a common-law cause of action without

obvious substitute remedy, the unsettled nature of this issue has encouraged courts to undertake the *quid pro quo* analysis, much as the *Duke Power* Court did, even while doubting its applicability. *See, e.g., Keller v. Dravo Corp.*, 441 F.2d 1239, 1242 (5th Cir. 1971) ("abolition of non-vested rights is especially innocuous if, as here, one remedy is substituted for another."); *Carr v. United States*, 422 F.2d 1007, 1011 (4th Cir. 1970) ("we think that in any event Congress provided an adequate *quid pro quo* for the common law cause of action which it abolished."). Such an important protection against the abolition of common-law rights should be clarified by the Court to remove any doubt that a legislature can abolish pre-existing rights only by providing a reasonable substitute remedy.

This type of analysis has a venerable pedigree. In *New York Central Railroad Co. v. White*, 243 U.S. 188 (1917), this Court upheld a workers' compensation program that replaced the uncertainty of unlimited common-law liability with a substitute system of broader no-fault liability and scheduled damages as a "just settlement of a difficult problem." *Id.* at 202. Significantly, the Court "doubted whether the [S]tate could abolish all rights of action on the one hand, or all defenses on the other, without setting up something adequate in their stead." *Id.* at 201.[3]

---

[3] The *White* Court noted that the workers compensation act at issue had "no retrospective effect, and applies only to cases arising some months after its passage." 243 U.S. at 202.

Similarly, in *Truax v. Corrigan*, 257 U.S. 312 (1921), this Court struck down an Arizona statute that rendered labor picketing "complete[ly] immun[e] from any civil . . . action," even if such conduct otherwise violated the common law. *Id.* at 328. The Court explained that "a statute whereby serious losses inflicted by such unlawful means are in effect made remediless [would] disregard fundamental rights of liberty and property and [ ] deprive the person suffering the loss of due process of law." *Id.* at 330. *See also Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 94 (1980) (Marshall, J., concurring) ("[T]here are limits on governmental authority to abolish 'core' common-law rights, . . . at least without a compelling showing of necessity or a provision for a reasonable alternative remedy.").

State courts, construing state constitutions, have recognized a similar need for a just substitute remedy when a common-law cause of action is legislatively abrogated. *See, e.g., Austin v. Abney Mills, Inc.*, 824 So. 2d 1137, 1145 (La. 2002) (amendment to worker's compensation statute to include disease caused by asbestos exposure could not under the Due Process Clause abrogate accrued common-law action of employee); *Smothers v. Gresham Transfer Co.*, 23 P.3d 333, 354 (Or. 2001) ("legislature cannot deny a remedy entirely for injury to constitutionally protected common-law rights"); *Resolution Trust Corp. v. Fleischer*, 892 P.2d 497, 503 (Kan. 1995) (pending action against trust company for negligence and breach of fiduciary duty was a protected property right that could not be limited by statute consistently with due process); *Thorp v. Casey's Gen. Stores, Inc.*, 446 N.W.2d 457, 459-460 (Iowa 1989) (dismissal of pending suit under dram shop act because of statutory change making suits

more difficult violated Due Process Clause because it destroyed vested property right in plaintiff's cause of action); *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 676 (Utah 1985) ("once a cause of action under a particular rule of law accrues to a person by virtue of an injury to his rights, . . . a legislative repeal of the law cannot constitutionally divest the injured person of the right to litigate the cause of action to a judgment"); *Gibson v. Commonw. of Pa.*, 415 A.2d 80, 83 (Pa. 1980) ("It is well-settled that the Legislature may not extinguish a right of action which has already accrued to a claimant").

Part of the confusion among modern federal courts derives from two ideas that have gained prevalence, even if not of proscriptive force. First, as this Court has frequently noted, a "person has no property, no vested interest, in any rule of the common law." *Munn v. Illinois*, 94 U.S. 113, 134 (1876). What this means, however, is that there is no right to see the common-law cause of action continued as it always has or to be entitled to an unchanged version of the remedy that always existed. As this Court recognized in *Truax*:

> It is true that no one has a vested right in any particular rule of the common law, but it is also true that the legislative power of a state can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve, and that a purely arbitrary or capricious exercise of that power whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned and the owner stripped of all

> real remedy, is wholly at variance with those principles.

257 U.S. 329-30. The *Munn* principle does not authorize the utter abrogation of a cause of action for past conduct, but instead enables the legislature to adjust the remedy reasonably to reflect modern realities. *See White*, 243 U.S. 188, 200-02.

Second, some courts have latched onto the idea that there is no "property" subject to due-process protection until there is a final judgment. *See, e.g., Ducharme v. Merrill-Nat'l Labs.*, 574 F.2d 1307, 1309 (5th Cir.), *cert. denied*, 439 U.S. 1002 (1978) (citation omitted) ("It is well settled that a plaintiff has no vested right in any tort claim for damages under state law."). Yet, this Court has recognized that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). *Accord Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 485 (1988) (holding that an unsecured claim, a cause of action against an estate for an unpaid bill, "is property protected by the Fourteenth Amendment"); *Phillips Petroleum Corp., v. Shutts*, 472 U.S. 797, 812 (1985) (members of class have property right to inchoate claim entitled to protection under Due Process Clause); *Martinez v. California*, 444 U.S. 277, 281-282 (1980) ("Arguably, the cause of action for wrongful death that the State has created is a species of 'property' protected by the Due Process Clause."); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (invalidating statutory scheme that permitted banks administering common trust funds to obtain decree absolving themselves from liability by publishing a notice for four consecutive weeks in a local

newspaper as violative of Due Process); *Coombes v. Getz*, 285 U.S. 434, 442 (1932) (reversing dismissal of pending suit against corporate directors for officers' misappropriation after repeal of provision permitting such suits, holding that "[t]he repeal put an end to the rule for the future, but it did not and could not destroy or impair the previously vested right of the creditor (which in every sense was a property right . . . to enforce his cause of action upon the contract"); *Ettor v. City of Tacoma*, 228 U.S. 148, 156 (1913) (court's dismissal of suits by property owners against city for damage after statute permitting suit was repealed "was to deprive the plaintiffs in error of a right which had vested before the repealing act,—a right which was in every sense a property right").

Such a view is consistent with the historical treatment of causes of action as a form of property known as a "chose in action," *see Sprint Commc'n Co., L.P. v. APCC Services, Inc.*, 128 S.Ct. 2531, 2536 (2008), and as something capable of being assigned, *id.* at 2538, or subrogated. *See United States v. Munsey Trust Co.*, 332 U.S. 234, 242 (1947).

In this era where special interests frequently seek immunity through legislative action, *see* Robert S. Peck and John Vail, *Blame it on the Bee Gees: The Attack on Trial Lawyers and Civil Justice*, 51 N.Y.L. SCH. L. REV. 323, 336-40 (2006-07), this Court's guidance is desperately needed to reconcile the line of cases recognizing a cause of action as property for Due Process purposes and those that treat it as inchoate until final judgment is rendered and to determine whether abrogation of an existing common-law cause of action requires a substitute remedy or offsetting benefits.

III. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND THE FEDERAL CIRCUIT COURTS IN HOLDING THAT CONGRESS'S CHOICES PROVIDE ALL THE PROCESS THAT IS DUE IN RETROSPECTIVE ECONOMIC LEGISLATION

The Court of Appeals confused the standard this Court has adopted with respect to procedural due process with the standards employed for substantive due process when it decided that the law comprised "economic legislation" and that Congress's deliberations provided "all the process that is due." App. 22a. The astounding breadth to which the court deferred to Congress is unprecedented and conflicts with decisions of this Court, other state courts of last resort, and the federal circuit courts.

In so holding, the court below conflated constitutional challenges to prospective economic legislation with the more searching inquiry this Court has applied to retrospective legislation. While granting Congress "considerable leeway to fashion economic legislation," this Court has held that Due Process requires a determination of whether the legislature has acted in an "arbitrary and irrational" manner, *Apfel*, 524 U.S. at 528, 537, quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976), but has applied stricter scrutiny "when legislation operates in a retroactive manner." *Id.* at 524 (citing *Usery*, 428 U.S. at 16-17). Rather than defer to Congress or dismiss without discussion Plaintiffs' arguments concerning the arbitrary and irrational nature of the PLCAA as the Court of Appeals did, this Court's decisions treat retroactive economic legislation with a concern that requires far more

serious treatment and specific analysis. *See, e.g., United States v. Carlton,* 512 U.S. 26, 31 (1994); *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.,* 508 U.S. 602, 641 (1993); *General Motors Corp. v. Romein,* 503 U..S. 181, 191 (1992); *United States v. Sperry Corp.,* 493 U.S. 52, 64 (1989); *United States v. Hemme,* 476 U.S. 558, 567-572 (1986); *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.,* 467 U.S. 717, 729-30 (1984).

The decision of the Court of Appeals to categorize the PLCAA as economic legislation and then engage in a plenary deferral to Congress is in fact utterly inconsistent with Anglo-American constitutional traditions. *See Dash v. Van Kleeck,* 7 Johns. 477, *503 (N.Y. 1811) ("It is a principle of the *English* common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect") (Kent, C.J.). Moreover, this Court has flatly stated that the "retroactive aspects of [economic] legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." *Usery,* 428 U.S. at 17. Nothing in that formulation of the due-process requirement treats congressional enactment as "all the process that is due," a form of analysis that this Court has reserved for procedural due-process compliance. *See Conn. Dep't of Pub. Safety v. Doe,* 538 U.S. 1, 8 (2003) (Scalia, J., concurring).

The federal circuits have had no difficulty in recognizing their obligation to take seriously due-process claims against retrospective economic legislation, or economic legislation more generally. *See, e.g., Gadda v. State Bar of Cal.,* 511 F.3d 933, 938 (9th Cir. 2007) (applying rational-basis review to

retrospective economic legislation). *See also Kt & G Corp v. Attorney Gen. of the State of Ok.*, 535 F.3d 1114, 1138 (10th Cir. 2008) (applying rational basis scrutiny); *Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430, 442 (8th Cir. 2007) (requiring economic legislation be neither arbitrary nor irrational).

Just as this Court would "hesitate to approve the retrospective imposition of liability on any theory of deterrence . . . or blameworthiness," *Usery*, 428 U.S. at 17 (citation omitted), it should be similarly reluctant to permit Congress to grant immunities for past conduct that may give rise to liability under state or local law, especially when Congress has relied solely on its power to regulate commerce, which is only a power to legislate prospectively. Such a situation calls for scrutiny, rather than deference.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

October 23, 2008

ROBERT S. PECK*
VALERIE M. NANNERY
CENTER FOR
CONSTITUTIONAL
LITIGATION, P.C.
777 Sixth Street, N.W.
Suite 520
Washington, DC 20001
(202) 944-2874
robert.peck@cclfirm.com

JONATHAN E. LOWY
BRIAN J. SIEBEL
DANIEL R. VICE
BRADY CENTER TO PREVENT
GUN VIOLENCE
LEGAL ACTION PROJECT
1225 EYE STREET, N.W.
SUITE 1100
WASHINGTON, DC 20005
(202) 289-7319

Counsel for Petitioners

*Counsel of Record

APPENDIX

TABLE OF CONTENTS

APPENDIX A: Opinion of the District of Columbia Court of Appeals (January 10, 2008) .. 1a

APPENDIX B: Judgment of the Superior Court of the District of Columbia, Civil Division (May 22, 2006) 37a

APPENDIX C: Memorandum Opinion and Order of the Superior Court of the District of Columbia, Civil Division (May 22, 2006) 38a

APPENDIX D: Opinion of the District of Columbia Court of Appeals (April 21, 2005) 82a

APPENDIX E: Opinion of the Superior Court of the District of Columbia (December 16, 2002) 134a

APPENDIX F: ORDER of the District of Columbia Court of Appeals (June 9, 2008)..... 255a

APPENDIX G: U.S. Const. art. I § 8..... 257a

APPENDIX H: U.S. Const. amend. V..... 258a

APPENDIX I: 15 U.S.C. §§ 7901-7903 ..... 259a

APPENDIX J: D.C. Code. § 7-2551 ..... 269a

APPENDIX A

OPINION OF THE DISTRICT OF COLUMBIA COURT OF APPEALS (JANUARY 10, 2008)

DISTRICT OF COLUMBIA, *et al.*, Appellants,
v.

BERETTA U.S.A. CORPORATION, et al., Appellees.

Nos. 06-CY-721 & 06-CY-757

Appeals from the Superior Court of the
District of Columbia
No. CA-428-00

(Honorable Brook Hedge, Trial Judge)

Argued November 20, 2007
Decided January 10, 2008
Rehearing Denied June 9, 2008

Paul R. Q. Wolfson, with whom, *A. Stephen Hut, Jr.*, *David S. Molot*, *Karen C. Daly*, *Rachel Z. Stutz*, *Ryan P. Phair*, *Katherine Race Brin*, *Dennis A. Henigan*, *Brian J. Siebel*, *Daniel R. Vice*, *Roderick V.O. Boggs*, *Susan E. Huhta*, *Robert S. Peck*, *Ned Miltenberg*, and *Andre Mura* were on the brief, for the individual appellants.

James C. McKay, Jr., Senior Assistant Attorney General, with whom *Linda Singer*, Attorney Genreral for the District of Columbia at the time the brief was filed, *Todd S. Kim*, Solicitor General, and *Edward E. Schwab*, Deputy Solicitor General, were on the brief, for appellant the District of Columbia.

Bert H. Deixler and *Mark J. Biros* filed a brief amicus curiae on behalf of the appellants.

Michael L. Rice, with whom *Thomas E. Fennell, Paul R. Reichert, Tashena Middleton Moore, Lawrence S. Greenwald, Lawrence P. Fletcher-Hill, Catherine A. Bledsoe, James P. Dorr, Sarah L. Olson, Paul F. Strain, M. King Hill, III, John F. Renzulli, Scott C. Allen, Thomas V. McCarron, Timothy A. Bumann*, and *Robert E. Scott, Jr.*, were on the brief, for appellees.

Isaac J. Lidsky, Attorney, Appellate Staff, Civil Division, U.S. Department of Justice, with whom *Peter D. Keisler*, Assistant Attorney General, *Jonathan F. Cohn*, Deputy Attorney General, and *Mark B. Stern* and *Michael S. Raab*, Attorneys, Appellate Staff, were on the brief, for intervenor-appellee United States of America.

Before FARRELL, REID, and GLICKMAN, *Associate Judges*.

FARRELL, *Associate Judge:* This appeal presents two primary issues: Does the Protection of Lawful Commerce in Arms Act ("the PLCAA"), 15 U.S.C. §§ 7901 et *seq.* (2005), by its terms require dismissal of the plaintiff/appellants' suit under the District of Columbia's Assault Weapons Manufacturing Strict Liability Act of 1990, D.C. Code § 7-2551.01 et *seq.* (2001) ("the SLA"); and, if so, does the PLCAA as applied to the plaintiffs' pending claims under the SLA violate separation of powers principles or due process principles embodied in the Fifth Amendment, or constitute a "taking" under the Fifth

Amendment for which "just compensation" must be paid. We answer the first question yes, the second question no, and affirm the dismissal of the plaintiffs' suit.

I.

This litigation began when the individual plaintiffs and the District of Columbia (hereafter collectively "the plaintiffs") sued the defendants, various gun manufacturers, importers, or distributors of firearms, alleging negligence, creation of a public nuisance, and liability under the SLA.[1] This court in *District of Columbia v. Beretta*, 872 A.2d 633 (D.C. 2005) (en banc) *(Beretta I)*, upheld the trial court's dismissal of the negligence and public nuisance claims but reversed the dismissal of the SLA claim, allowing the individual plaintiffs to "advance to discovery on strict liability notwithstanding the difficulties of proof they may confront," and similarly permitting the District government to proceed on that claim "to the extent . . . that it seeks subrogated damages as to named

---

[1] The SLA provides, in relevant part:

> Any manufacturer, importer, or dealer of an assault weapon or machine gun shall be held strictly liable in tort, without regard to fault or proof of defect, for all direct and consequential damages that arise from bodily injury or death if the bodily injury or death proximately results from the discharge of the assault weapon or machine gun in the District of Columbia.

D.C. Code § 7-2551.02.

individual plaintiffs for whom it has incurred medical expenses." *Id.* at 637.

Subsequently, however, Congress enacted the PLCAA, key purposes of which (as stated in 15 U.S.C. § 7901 (b)), were to:

> (1). . . prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended . . . . [and]
>
> * * * *
>
> (4) . . . prevent the use of such lawsuits to impose reasonable burdens on interstate and foreign commerce.

The PLCAA provides that a "qualified civil liability action may not be brought in any Federal or State court," *Id.* § 7902 (a), and that a "qualified civil liability action that is pending on October 26, 2005 [the date of enactment], shall be immediately dismissed by the court in which the action was brought or is currently pending." Id. § 7902 (b). A "qualified civil liability action" is defined as:

> a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of

> a qualified product[2], or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party . . . .

However, not every civil action against a manufacturer or seller of firearms is barred by the PLCAA. Specifically, as relevant here, a qualified civil liability action "shall not include";

> * * * *
>
> (iii) an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought, including —
>
> (I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified

---

[2] A "qualified product" is defined as "a firearm (as defined in subparagraph (A) or (B) of section 921 (a)(3) of title 18), including any antique firearm (as defined in section 921 (a)(16) of such title), or ammunition (as defined in section 921 (a)(17)(A) of such title), or a component part of a firearm or ammunition, that has been shipped or transported in interstate or foreign commerce." 15. U.S.C. § 7903 (4).

> product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or
>
> (II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of Title 18.

Id. § 7903 (5)(A)(iii). The parties here, and other courts construing this language, have referred to subsection (5)(A)(iii) as the "predicate exception" to the PLCAA because, to take effect, it requires that the manufacturer or seller have committed an underlying (or predicate) statutory violation. We will identify it that way also.

Following enactment of the PLCAA, the defendants here moved to dismiss the SLA claim, and on May 22, 2006, Judge Brook Hedge granted the motion in a memorandum opinion and order. She concluded, first, that because the SLA "is a state statute[3] that applies specifically and exclusively to the firearms industry," causes of action under the

---

[3] The PLCAA defines the District of Columbia as a "State" for purposes of the statutory exception and the other provisions of the statute.

SLA would, "under a literal interpretation of the predicate exception, . . . seem to be excluded from the PLCAA's definition of a 'qualified civil liability action.'" Nevertheless, the judge applied principles of statutory construction to consider whether, "[w]hen taken as a whole and in the context of the purpose of the PLCAA, . . . the predicate exception was meant to include any state statute that applies to a result of the sale or manufacture of firearms, or [instead] whether it was meant to include only those state statutes that apply to the *manner* in which firearms are marketed or sold" (emphasis in original). Performing this inquiry, in particular after applying the doctrine of *ejusdem generis* ("where specific words follow general words, the application of the general term is restricted to things ... similar to those specifically enumerated," citing 2A N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.17 (5th ed. 1992)), the court reasoned that "the specific cases given as examples in the predicate exception are clearly those involving violations of statutes regulating the *manner* in which firearms are sold or marketed," and that, accordingly, "the state statutes ... mentioned in the general part of the predicate exception are limited to [those] regulating the manner in which firearms are sold or marketed, and not statutes that are merely capable of being applied to the result of the sale or marketing of firearms." Any other interpretation, the judge believed, would "lead[] to a result ... plainly at variance with the [PLCAA] as a whole." Thus, because the SLA by its terms is not a statute regulating how—the manner in which—firearms are marketed, it "imposes the type of liability ... Congress has attempted to prohibit by . . . the

PLCAA," and the plaintiffs had failed to bring their cause of action within the predicate exception.

The judge further rejected the plaintiffs' arguments for unconstitutionality of the PLCAA as applied. First, although the PLCAA directs the "immediate[] dismiss[al]" by courts of any "qualified civil liability action" still pending, it docs not violate the separation of powers and specifically "the rule stated in *United States v. Klein,* 80 U.S. (13 Wall.) 128 (1871)," because the statute "works to provide a new legal standard for courts to apply" it "defines a new class of civil actions"—and, rather than dictating the judgment in a case, leaves to the courts the "determination as to whether particular cases satisfy that new legal standard or its exceptions." Nor does the statute deprive claimants whose cause of action has accrued under the SLA of due process of law, the judge ruled, because "[a] typical tort cause of action, whether based in statute or in the common law, . . . 'is inchoate and affords no definite or enforceable property right until reduced to final judgment'" (citation omitted); and it therefore may be limited or eliminated by legislation such as the PLCAA that is "rationally related to a legitimate governmental purpose." Finally, for essentially the same reason, the judge ruled that the plaintiffs' cause of action under the SLA is not a "vested property right" subject to the Takings Clause of the Fifth Amendment.

II. Statutory Interpretation

We consider first the plaintiffs' argument that their cause of action under the SLA fits within the predicate exception of the PLCAA, an issue of statutory construction that we decide *de novo. See*

Chamberlain v. American Honda Finance Corp., 931 A.2d 1018, 1022-23 (D.C. 2007). As the plaintiffs concede, if their action is not one alleging "violat[ion by the defendants of] a ... statute applicable to the sale or marketing of' a firearm, 15 U.S.C. § 7903 (5)(A)(iii), then it is a "qualified civil liability action" that must be dismissed, unless the Constitution dictates otherwise.[4]

The plaintiffs contend they have met the predicate exception because their complaint alleges that the defendants "knowingly violated" the SLA, a statute that by its express terms "appli[es] to the sale or marketing of' a class of firearms. Our difficulty with this position begins, however, with determining just how the defendants may be said to have "violated" the SLA. In ordinary language, a "violation" is understood to mean "an infringement or transgression," WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2554 (2002 ed.), and a violation of a law to mean "[a]n infraction or breach of the law." BLACK'S LAW DICTIONARY 1600 (8th ed. 2004). Plain meaning, therefore, would seem to require the law in question to contain a prohibition against, or standards of, conduct that are being violated. Indeed, the PLCAA illustrates statutory "violations" in *this* sense that it has in

---

[4] Dismissal in this event would be required whether the matter is viewed as one of federal pre-emption or, instead, as an instance of the rule that "a congressional statute of national application prevails over a statute applying only to the District of Columbia." *In re Estate of Couse*, 850 A.2d 304, 305 n.1 (D.C. 2004) (quoting *District of Columbia v. Wolverton*, 112 U.S. App. D.C. 23,24 n.3, 298 F.2d 684, 685 n.3 (1961)).

mind by exempting from its reach actions in which, for example, the manufacturer or seller is shown to have "knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to [firearms]," § 7903 (5)(A)(iii)(I), or to have "conspired with any other person to sell" a firearm knowing that the actual buyer "was prohibited from possessing or receiving a firearm" under federal law. Section 7903 (5)(A)(iii)(II). Significantly, too, District of Columbia law provides a statutory cause of action for damages against firearms manufacturers or sellers who "violate[] a ... statute" in the commonly understood sense of those words. *See* D.C. Code § 7-2531.02 (a) (200 I). While otherwise generally mirroring the SLA, it requires proof that the defendant "knowingly and willfully engaged in *the illegal* sale" of a firearm, *id.* (emphasis added), defined to mean any of four actions including "[f]ailure to establish proof of the purchaser's residence in a jurisdiction where the purchase of the weapon is legal," *id.* § 7-2531.01 (4)(A), or "[f]ailure to maintain full, complete, and accurate records of firearm sales as required by local, state, and federal law." *Id.* § 7-2531.01 (4)(c).

The plaintiffs, however, have not alleged liability under D.C. Code § 7-2531.02, nor is their SLA claim that the defendants knowingly violated any proscriptions or requirements of local or federal law governing the sale or possession of firearms. Instead their argument is that the SLA, which by its terms would make these defendants "strictly liable in tort" for death or injuries resulting from the discharge of an assault weapon or machine gun they manufactured or sold, embodies "a legal duty owed to the residents of the District" and that its

requirement to compensate for injuries "thus presupposes a 'violation' of a statutory duty." Br. for Individual Plaintiffs at 4-5 (citing BLACK'S LAW DICTIONARY as defining "violation" broadly to include "contravention of a right or duty").

Imaginative though this argument is, we think it stretches the meaning of "violation" well beyond what the authors of the PLCAA reasonably intended. The SLA imposes no duty on firearms manufacturers or sellers to operate in any particular manner or according to any standards of care or reasonableness. *Cf. e.g., City of Gary ex rel. King v. Smith & Wesson Corp.*, 801 N.E.2d 1222 (Ind. 2003) (construing Indiana's public nuisance statute as embracing claim that gun manufacturers engaged in *unreasonable* distribution practices). The statute is "violated," in the plaintiffs' view, merely when a person is killed or injured by the discharge of an assault weapon manufactured or sold by a named defendant—an injury that may occur years after the manufacture or sale and despite the utmost care taken in the manufacture or sale. The SLA, in short, imposes a duty to pay compensation neither more nor less[5]—and normal principles of statutory construction make it impossible for us to conclude that Congress

---

[5] The plaintiffs acknowledge that the closest analogy to the cause of action the SLA creates is the common law doctrine of "abnormally dangerous activities," which makes a party engaging in such activity a virtual insurer against resulting injury. *See* RESTATEMENT (SECOND) OF THE LAW, TORTS § 519 cmt. d. at 35 (1977) (liability imposed by this doctrine is "the responsibility of relieving against [the] harm [caused by such activity] when it does in fact occur").

intended to exempt an action founded on so attenuated a connection between a statutory "violation" and an injury from the reach of those civil actions the PLCAA proscribes.

For one thing, as we have implied, the literal meaning of the predicate exception—*i. e.*, its operative requirement of a "violat[ion of] a . . . statute"—connotes in ordinary speech something very different from a duty to compensate without having transgressed upon or breached any standard of conduct or care separately imposed. But even assuming some ambiguity in Congress's choice of a verb, we have also seen that the statute gives specific indication, in the succeeding paragraphs, of the class of statutory violations Congress had in mind, and none of these can reasonably be compared to a "violation" consisting of no more—nor less—than a duty to insure against injuries resulting from the discharge of a firearm. *See generally* 2A N. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.17 (5th ed. 1992) (where specific words follow general words, application of the general term is normally restricted to things similar to those specifically enumerated). Furthermore, the predicate exception requires proof that, despite the misuse of the firearm by a third person, "the [statutory] violation was a proximate cause of the harm for which relief is sought," § 7903 (5)(A)(iii), and it is quite implausible, we think, that Congress meant by this no greater showing than of a causal link between the "injury or death . . . [and] the *discharge* of the assault weapon or machine gun in the District of Columbia." D.C. Code § 7-2551.02 (emphasis added).

Finally, individual words of a statute "are to be read in the light of the statute taken as a whole," *Columbia Plaza Tenants' Ass 'n v. Columbia Plaza Ltd. P'ship,* 869 A.2d 329, 332 (D.C. 2005), and where possible, courts should avoid constructions "at variance with the policy of the legislation as a whole." *Jeffrey v. United States,* 892 A.2d 1122, 1128 (D.C. 2006). Congress was explicit in stating the "policy," *i.e.,* the purposes underlying the PLCAA. Key among these were an intent "[t]o prohibit causes of action against manufacturers, distributors, dealers and importers of firearms for the harm solely caused by the criminal or unlawful misuse of firearms products by others when the product functioned as designed and intended," 15 U.S.C. § 7901 (b)(1), and "[to prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce." *Id.* § 7901 (b)(4). *See Ileta v. Glock, Inc.,* 421 F. Supp. 2d 1274, 1289 (C.D. Cal. 2006) ("[T]he clear purpose of the PLCAA was to shield firearms manufacturers and dealers from liability for injuries caused by third parties using non-defective, legally obtained firearms.").[6] Shoehorning, as it were, into

---

[6] One congressional "finding" that underlay these purposes was a concern with liability actions "without foundation in hundreds of years of the common law" and that "do not represent a bona fide expansion of the common law." 15 U.S.C. § 7901 (a)(7). From these words the plaintiffs infer that Congress was substantially less troubled by the existence of *statutory* liability actions reflecting judgments "by the legislatures of the several States." *Id.* No such distinction, though, is reflected either in the definition of a "qualified civil liability action" or in the enumerated actions excluded therefrom, including the predicate exception; and to posit one all the same would ignore Congress's objection to "[l]awsuits" as a class

the predicate exception a strict liability cause of action that, at bottom, simply shifts the cost of injuries resulting from the discharge of law fully manufactured and distributed firearms would, in our view, "frustrate Congress's clear intention," *Hubbard v. United States,* 514 U.S. 695, 703 (1995), reflected in the PLCAA.

By the terms of thc PLCAA, the plaintiffs' action under the SLA was properly dismissed.

III. Constitutional Issues

The plaintiffs next argue that the PLCAA, read to divest them of their pending cause of action under the SLA, (a) violates principles of separation of powers, (b) deprives them of a "vested right" contrary to due process principles embodied in thc Fifth Amendment, and (c) amounts to an unconstitutional taking of their property. We consider these arguments in succession, again conducting *de novo* review. *See In re Warner,* 905 A.2d 233,238 (D.C. 2006).

A. Separation of Powers

Relying on *United States v. Klein,* 80 U.S. 128 (1871), the plaintiffs argue that if the PLCAA requires dismissal of their action, it violates the separation of powers by "prescrib[ing] a rule for the decision of a cause in a particular way," *id.* at 146,

---

(unless excepted) that "seek money damages and other relief [against manufacturers and sellers] for the harm caused by the misuse of firearms by third parties, including criminals." *Id.* § 7901 (a)(3).

thereby usurping a judicial function.[7] We are not persuaded.

In *Klein*, the administrator of the estate of a Confederate sympathizer sought to recover the value of property seized by federal agents during the Civil War. *See Id.* at 136. The administrator prevailed in the Court of Claims, based on legislation that authorized recovery upon proof that the property owner had not given aid or comfort to the rebellion. *See id.* at 139, 143. The Supreme Court had previously held that a presidential pardon was enough to prove loyalty under this provision. *See id.* at 145. While *Klein* was pending in the Supreme Court, however, Congress passed a statute providing that a pardon was inadmissible as evidence of loyalty (indeed would constitute evidence of disloyalty), and further requiring the Court of Claims and the Supreme Court to dismiss for lack of jurisdiction any pending claims based on a pardon. *See id.* at 143, 145. The Supreme Court held this to be an impermissible attempt by Congress to "prescribe

---

[7] The United States asserts, at the threshold, that because *Klein* is premised on separation of powers principles it has no application to "Congress's regulation of non-Article III courts like those of the District of Columbia" (Br. for United States at 11). The plaintiffs respond that "[n]othing in *Klein* suggests that [its] rule does not apply to all independent judicial bodies, including the District of Columbia courts, which indisputably enjoy the same autonomy from improper legislative directives that Article III grants to federal courts" (Reply Br. for Indiv. Plaintiffs at 11-12 n.10). Our resolution of this issue enables us to stay clear of that interpretive thicket.

rules of decision to the Judicial Department of the government in cases pending before it." *Id.* at 146.

"Whatever the precise scope of *Klein*, however, later decisions have made clear that its prohibition does not take hold when Congress 'amend[s] applicable law.'" *Plaut v. Spendthrif Farm, Inc.*, 514 U.S. 211, 218 (1995) (quoting *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992)). *Robertson* itself demonstrated this critical distinction. There Congress passed a law responding to litigation that challenged the government's efforts to allow logging in forests that were home to the endangered northern spotted owl. Existing law, under which the pending lawsuits had been brought, broadly made it "unlawful to 'kill' or 'take' any 'migratory bird.'" *See* 503 U.S at 437. The new law Congress passed (the Northwest Timber Compromise) designated specific areas in which logging would be prohibited, but also provided that harvesting in accordance with these restrictions - *i.e.*, "management"—would meet "the statutory requirements that [were] the basis for the" existing lawsuits. *Id.* at 433-34, 437-38. A lower court held that the Compromise effectively "direct[ed] the court to reach a specific result and make certain factual findings under existing law in connection with two [pending] cases," thereby violating *Klein's* bar against Congress "directing ... a particular decision in a case." *Id.* At 436 (quoting *Seattle Audubon Soc'y* v. *Robertson*, 914 F.2d 1311, 1315-16 (9th Cir. 1990)). The Supreme Court reversed and ruled *Klein* inapplicable.

The new law "compelled changes in law," the Court said, "not findings or results under old law."

Id. at438. By substituting new standards or limitations on harvesting, it "modified the old provisions" and, importantly, did not "purport[] to direct any particular findings of fact or applications of law, old or new, to fact." *Id.* What Congress directed by the Compromise, in short, "was a change in law, not specific results under old law," *id.* at 439, and "[t]o the extent [it] affected the adjudication of the [existing] cases, it did so by effectively modifying the provisions at issue in those cases," *id.* at 440, leaving the courts the task to apply and make proper findings under them.

Plaut and *Robertson* demonstrate why *Klein* does not apply to this case. The PLCAA sets forth new standards that must be met before a case may be brought or a pending one may proceed against the manufacturer or seller of a firearm for damages resulting from the use of the firearm by a third person. When, but only when, a suit is found by a court not to meet one of the statutory exceptions to a "qualifed civil liability action," it must be dismissed. As Judge Hedge correctly reasoned, "nothing within the statute controls a court's determination as to whether particular cases satisfy [the] new legal standard or its exceptions." In the words of *Robertson*, the statute "dircct[s no] particular findings of fact or application of law . . . to fact"; rather, in the Supreme Court's more recent words, instead of "prescribing a rule of decision, [it] simply imposes the consequences of the court's application of the new legal standard," *Miller v. French*, 530 U.S. 327, 349 (2000), a quintessential judicial task. *See also, e.g., Axel Johnson, Inc. v. Arthur Andersen & Co.*, 6 F.3d 78, 82 (2d Cir. 1993) (statute that "leaves to the courts the task of determining whether a claim

falls within the ambit of the statute" raises no issue under *Klein).* The statute thus raises no separation of powers issue.

B. Due Process

The plaintiffs contend that their accrued cause of action under the SLA amounts to a property right that Congress could not abridge by retroactive application of the PLCAA. As the District of Columbia puts it (Br. for District at 17), "an accrued cause of action is a vested property right . . . that . . . cannot be divested by statute, including a statute applied retroactively." Moreover, they argue that a decision binding on this panel, *Barrick v. District of Columbia,* 173 A.2d 372 (D.C. 1961), *aff'd sub nom. Swenson v. Barrick, 112* U.S. App. D.C. 342, 302 F.2d 927 (1962), held exactly that, in ruling that due process barred Congress from retroactively divesting plaintiffs of an accrued cause of action for negligence under District of Columbia law. While the plaintiffs' arguments are not fanciful, they do not persuade us that Congress violated due process by making the PLCAA apply to pending eases.

Laws enacted by Congress under its power to regulate interstate commerce, and thus meant to "adjust[] the burdens and benefits of economic Iife[,] come to the Court with a presumption of constitutionality, and . . . the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. I, 15 (1976). This

> strong deference accorded legislation in the field of national economic policy is no less

> applicable when that legislation is applied retroactively. Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches.

Pension Benefit Guar. Corp. v. R. A. Gray & Co., 467 U.S. 717, 729 (1984). In other words, "the *constitutional* impediments to retroactive civil legislation arc now modest," reflecting thc fact that "[i]n this century, legislation has come to supply the dominant means of legal ordering, and circumspection has given way to greater deference to legislative judgments." *Landgraf v. USI Film Proaucts,* 511 U.S. 244,. 272 (1994) (emphasis in original). Among the "benign and legitimate purposes" retroactivity may serve is "simply to give comprehensive effect to a new law Congress considers salutary," where Congress has also determined "that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Id.* at 268. Thus, even where retroactive application will impair "substantive rights" possessed before the enactment, *id.* at 278, a court "in many situations" will be required to "apply the law in effect at the time it renders its decision," *id.* at 273 (citation and quotation marks omitted), provided that Congress has made its intention to impose this requirement clear.

Undeniably, Congress meant the PLCAA to apply to pending "qualified civil liability actions." Nor have the plaintiffs persuasively argued that Congress

acted arbitrarily or irrationally, *see Usery, supra,* in giving "comprehensive effect" to the statute by applying it to pending actions. *Landgraf, supra.* Congress was especially concerned with "[l]awsuits [that] *have been commenced"* seeking "money damages and other relief' against manufacturers and sellers of firearms for harms caused by the misuse of their products by others, including criminals, 15 U.S.C. § 7901 (a)(3) (emphasis added), and with the threat to interstate commerce of thus "imposing liability on an entire industry for harm . . . solely caused by others." *Id.* § 7901(a)(6). As the court stated in *Ileto, supra,* "[a]lthough one may disagree with Congress's predictions" about the effect on commerce of unchecked lawsuits of that kind, "one cannot credibly argue that the Act's retroactive provision does not further a legitimate legislative purpose." *Ileto,* 421 F. Supp. 2d at 1302. At the same time, Congress did not, as the District government suggests (Reply Br. at 16), "totally abrogate" causes of action holding manufacturers or sellers liable for their actions causally linked to discharge of their firearms. As the defendants concede, the District's own statutory cause for "strict[] liab[ility] in tort" of a manufacturer or seller who engages in an "illegal sale," D.C. Code § 7-2531.02 (a), illustrates the kind of actions left intact by the predicate exception. *See* 15 U.S.C. § 7903 (5)(A)(iii). (Also, Congress left undisturbed actions "brought against a seller for negligent entrustment or negligence per se," *id.* § 7903 (5)(A)(ii), as well as actions for "death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product." *Id.* § 7903 (5)(A)(v).) Thus the PLCAA, extending as it does to all pending and future actions but exempting specified kinds of lawsuits from its reach, is

reasonably viewed as an "adjust[ment of] the burdens and benefits of economic life" by Congress, *Usery, supra,* one it deemed necessary in exercising its power to regulate interstate commerce.

The plaintiffs argue, however, that all of this is essentially beside the point. They maintain that due process bars the retroactive application of the PLCAA to their action under the SLA because "a cause of action is a species of property protected by . . . [d]ue [p]rocess," *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982)—protected unqualifiedly, in their view, against retroactive abridgement. But *Logan,* in our judgment, imposes no such complete restriction on legislative authority. That case concerned an Illinois employment discrimination statute which provided that, within 120 days after a timely claim of unlawful discrimination had been filed with the state Fair Employment Practices Commission, the Commission was to convene a factfinding conference to explore the complaint informally. *See id.* at 424-25. The petitioner in *Logan* had filed a timely complaint, but the Commission's representative inadvertently failed to schedule the informal conference within the 120-day period. The state Supreme Court, interpreting the 120-day time limit as jurisdictional, held that it barred consideration of the petitioner's claim even though the missed deadline was entirely "the Commission's error." *Id.* at 427. The United States Supreme Court reversed, holding that as construed and applied by the state court, the 120-day limitation constituted "[a] system or procedure that deprives persons of their claims in a random manner." *Id.* at 434. The claimant had "a [constitutionally] protected property interest," a "right to redress . . . guaranteed by the

State," *id.* at 431, which could not be abridged in the arbitrary manner the state had employed without violating requirements of procedural due process laid down as early as *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and more recently in such cases as *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Mathews v. Eldridge, 424* U.S. 319 (1976).

Yet, while re-affirming that government could not "random[ly]" deny "potential litigants use of established adjudicatory procedures," *Logan*, 455 U.S. at 429, 434, the *Logan* Court was at pains to recognize the legislature's authority to make substantive changes affecting claims or causes of action. "[T]he State," it said, "remains free to create substantive defenses or immunities for use in adjudication - or to eliminate its statutorily created causes of action altogether." *Id.* at 432. Doing so does not deprive parties with "a protected property interest" of that interest "without due process," because in such cases "the legislative determination provides all the process that is due." *Id.* at 432-33.

The plaintiffs read this language as saying nothing about a legislature's power retroactively to "create immunities ... or to eliminate statutorily created causes of action." But in a case *(Logan)* where the issue was precisely the manner by which the state had deprived the claimant of a "right to redress . . . guaranteed" by law, it would be strange for the Court to have described the legitimate manner in which such "depriv[ation] . . . of a protected property interest" may be accomplished if, even hypothetically, it could not apply to the cause of

action in that case. *Logan,* 455 U.S. at431-32. At the least, *Logan* lends no
support to the distinction that the plaintiffs urge between a claim that, because it has accrued, enjoys unqualified protection—*i.e.*, has "vested" indefeasibly—and all others which the legislature may limit or even "eliminate." *Id.* at 432.

Rather, we think the correct constitutional distinction is one the Supreme Court has confirmed in the meantime and to which federal courts have almost uniformly adhered, namely, between causes of action that have reached final, unreviewable judgment and in *that* sense have vested and all others, pending and future, which may be modified by rationally grounded retroactive legislation. In *Plaut, supra,* the Supreme Court adverted to this distinction in striking down (as violative of the separation of powers) an amendment to the Securities Exchange Act of 1934 that required federal courts to reopen final judgments in private civil actions under § I 0 (b) of the Act. The Court said:

> When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted and must alter the outcome accordingly. *See United States v. Schooner Peggy,* 1 Cranch 103 (1801); *Landgraf*[,] . . . 511 U.S. [at] 273-280 . . . . It is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment, even when that has the effect of overturning the

> judgment of an inferior court, since each court, at every level, must "decide according to existing laws." *Schooner Peggy, supra,* 1 Cranch, at 109. Having achieved finality, however, a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was.

514 U.S. at 226-27 (emphasis in original). *See also Gavin v. Branstad,* 122 F.3d 1081, 1090-91 (8th Cir. 1997) ("The doctrine of vested rights . . . like the separation-of-powers doctrine expounded in *Plaut,* depends on the existence of a final judgment . . . . In essence, the vested rights doctrine is really only the due process analogue of the separation-of-powers doctrine that prevents Congress from reopening final judgments.")

Applying this distinction, federal appellate courts have repeatedly rejected claims, similar to the plaintiffs' here, that federal statutes modifying or abrogating pending state tort law actions violate due process by depriving litigants of their right to proceed. *See, e.g., Hammond v. United States,* 786 F.2d 8, 12-13 (1st Cir. 1986) ("Because rights in tort do not vest until there is a final, unreviewable judgment, Congress abridged no vested rights by . . . retroactively abolishing [plaintiff's] cause of action in tort"; while "Congress must comply with due process when abolishing or substantially modifying a common law cause of action," citing *Logan, supra,*

the enactment in question was not "arbitrary and irrational in purpose and effect" but rather "reasonably related to a legitimate congressional Purpose"); *In re TMI,* 89 F.3d 1106, 1113-15 (3d Cir. 1996); *Arbour v. Jenkins,* 903 F.2d 416,420 (6th Cir. 1990); *Salmon v. Schwarz,* 948 F.2d 1131, 1142-43 (10th Cir. 1991); *Sowell v. American Cyanamid Co.,* 888 F.2d 802, 805 (11th Cir. 1989). *See also Deck v. Peter Romein's Sons, Inc.,* 109 F.3d 383, 386-88 (7th Cir. 1997) (upholding, against due process challenge, amendment that limited recovery in pending survival and wrongful death claims under federal Migrant and Seasonal Agricultural Worker Protection Act to state workers' compensation benefits); *Gavin v. Branstad,* 122 F.3d at 1090-91 (upholding provision of Prison Litigation Reform Act that would require immediate termination of consent decree in pending constitutional challenge to prison conditions if relief was not "narrowly drawn"); *Austin v. City of Bisbee,* 855 F.2d 1429, 1434-37 (9th Cir. 1988) (upholding statute that delayed application of Fair Labor Practices Act to municipalities and thus barred plaintiff's pending claims for overtime pay); *Adams v. Hinchman,* 332 U.S. App. D.C. 98, 102, 154 F.3d 420, 424-25 (1998) (upholding amendment that reduced recovery in pending claims for overtime pay under Fair Labor Standards Act from six years to two years back pay); *and see Hyundai Merchant Marine Co. v. United States,* 888 F. Supp. 543, 551 (S.D.N.Y. 1995) (upholding statute that barred claims based on content of navigational charts produced by the Defense Mapping Agency and so required dismissal of pending action for damages under Suits in Admiralty Act).

Joining these courts, we hold that while the plaintiffs' cause of action under the SLA "is a species of property protected by . . . [d]ue [p]rocess," *Logan*, 455 U.S. at 428, they received "all the process that is due," *id.* at 433, when Congress barred pending actions such as theirs from proceeding as a rational means "to give comprehensive effect to a new law [that it] consider[ed] salutary." *Landgraf;* 511 U.S. at 268.[8] Actions such as the plaintiffs' that are still pending and have not been reduced to judgment raise no concern with applying a "new provision [that] attaches new legal consequences to events *completed* before its enactment." *Id.* at 270 (emphasis added). *See also General Motors Corp. v. Romein,* 503 U.S. 181,191 (1992) (rejecting claim that state statute, reflecting legitimate legislative purpose

---

[8] Because, as explained earlier, Congress did not deprive injured persons of all potential remedies against manufacturers or sellers of firearms that discharge causing them injuries, we need not consider the plaintiffs' subsidiary claim that due process at least requires Congress to supply an alternative remedy before it may eliminate a cause of action retroactively. *But see. e.g., Duke Power Co. v. Carolina Envtl. Study Group. Inc.,* 438 U.S. 59, 88 (1978) ("[I]t is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy."); *Kyle Rys., Inc. v. Pacific Admin. Servs., Inc.,* 990 F.2d 513, 518-19 (9th Cir. 1993) (rejecting argument that, "by preempting any state law causes of action . . . while failing to provide substitute federal causes of action, ERISA . . . left a gap in the law" and violated due process: "[S]uch a gap is legitimate if it is the result intended by Congress.") (internal quotations omitted).

furthered by rational means, "violated due process because its retroactive provisions unreasonably interfered with *closed transactions*" (emphasis added)); *Eastern Enters. v. Apfel*, 524 U.S. 498, 548 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) ("If retroactive laws changed the legal consequences of transactions *long closed*, the change can destroy the reasonable certainty and security which are the very objects of property ownership.") (emphasis added). Pending causes of action, by definition, have reached nothing like that state of completion, and thus may properly yield to a legislative determination "to give comprehensive effect to a new law Congress considers salutary." *Landgraf*, 511 U.S. at 268.

It remains for us to explain why *Barrick v. District of Columbia, supra,* does not stand in the way of this holding. *See generally M.A.P. v. Ryan*, 285 A.2d 310 (D.C. *1971*). *Barrick* did, indeed, recite "[t]he general rule . . . that 'retrospective laws are unconstitutional if they disturb or destroy existing or vested rights.'" 173 A.2d at 375, quoting 16 C.J.S. CONSTITUTIONAL LAW § 417, and citing, *inter alia,* 2 SUTHERLAND, STATUTORY CONSTRUCTION § 2205 (3d ed. 1943). And *Barrick* employed that rule to hold unconstitutional as applied an act of Congress that substituted the District of Columbia government for a District employee acting within the scope of his authority in any suit for negligence arising from the operation of a District motor vehicle, but supplanted the existing standard of negligence with a requirement that the plaintiff prove gross negligence if the vehicle was on an "emergency run." *See id.* at 374. After finding that Congress intended the new act "to apply

retroactively as well as prospectively," the court held that "the Act in its application to the facts of this case results in an unconstitutional deprivation of [the plaintiff's] property right" that had "vested" well before the date of enactment. *Id.* at 375, 376.

The defendants argue that *Barrick*, although plainly based upon an understanding of "vested rights" contrary to the one we have joined here, is distinguishable because it dealt only with abrogation of a common law cause of action, unlike the statutory action created by the SLA. *Barrick* does provide support for that distinction. In stating that the plaintiff's "cause of action against the ambulance driver [*i.e.*, the District employee] was a property right," *id.* at 375, the court quoted in a footnote this passage from *Massa v. Nastri*, 3 A.2d 839, 840 (Conn. 1939): "A right of action . . . is a vested property interest . . . at least 'where it comes into existence under common-law principles, and is not given by statute as a mere penalty or without equitable basis.'" Also, in acknowledging that "[w]hen ... a legislative intent [to make a statute retroactive] is clear, retroactivity by itself does not make a statute invalid," the court cited *Kahn* v. *Wall*, 68 A.2d 862 (D.C. 1949), a prior binding decision that rejected a landlord-plaintiff's constitutional attack upon new rental housing legislation as applied to him, because the landlord's right "to obtain possession of his apartment was strictly statutory" and "[r]ights conferred by statute may be modified by subsequent legislation without violation of any constitutional provision." *Id.* at 864 (footnote omitted).[9]

---

[9] *See also De Ferranti* v. *Lyndmark*, 30 App. D.C. 417, 424 (1908) ("The proceedings requisite to the acquiring of a patent are closely analogous to the procedure in an action

We choose not to distinguish *Barrick* on this basis, however. The federal appellate decisions cited earlier, which we find persuasive, do not further distinguish among pending—*i.e.*, non-final—actions based on whether they were statutory or common-law based. And, to accord common-law actions greater privilege in this regard is difficult to reconcile with the Supreme Court's observation in *Duke Power Co., supra* note 8, at 88 n.32 (though not in the context of treating retroactivity), that "a person has no property, no vested interest, in any rule of the common law" and that the "Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object." *Duke Power Co.*, 438 U.S. at 88 n.32 (citations and internal quotation marks omitted).

Instead, we conclude that this is a situation where the law simply has not "stood still" since *Barrick, see Elam* v. *Monarch Life Ins. Co.*, 598 A.2d 1167, I 170 (D.C. 1991), so much so that we would err in continuing to adhere to its holding. High Court decisions including *Usery, Pension Benefit Guar. Corp, Landgraf,* and *Plaut* have refined the law of

---

at law before reaching final judgment, where the right is one conferred by statute and entirely dependent upon the legislative will. In both instances they are mere matters of procedure that may be changed or abolished . . . . The bringing of a suit in such a case does not create a vested right. It is only the assertion of a right that mayor may not mature into a vested right. No vested right is acquired by the bringing of such a suit, that is beyond legislative control, until judgment is rendered.").

retroactivity in civil matters—subjecting retroactive civil legislation to "modest" constitutional limits, *Landgraf*, 511 U.S. at 272, while otherwise leaving legislatures free to "readjust[economic] rights and burdens" so as even to "upset[] otherwise settled expectations," *Usery*, 428 U.S. at 16, or impair "substantive rights," *Landgraf;* 511 U.S. at 278—in a manner quite incompatible with the notion of unqualified, indefeasible vested rights adopted in *Barrick*.[10] A division of this court is not obliged "to

---

[10] *Barrick*, for example, relied on the 1943 edition of SUTHERLAND ON STATUTORY CONSTRUCTION, but succeeding editions have recognized that "[i]t is impossible to discover the precise meaning of the term [vested rights] through which all of the decisions [employing it] can be consistently explained," 2 NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 41 :6, at 423-27 (6th ed., rev. 2001), and that such rights may be abridged by retroactive amendment "if it is clear that the legislature intended the amendment to operate in such a fashion" provided that, as a species of "property," they arc "protect[ed] from *arbitrary* interference." *Id.* at 428 (emphasis added).

We observe, moreover, that the statute at issue in *Barrick*, the District of Columbia Employee Non-Liability Act, 74 Stat. 519 (1960), was an exercise of Congress's authority to legislate exclusively for the District of Columbia, *see generally Palmore v. United States*, 411 U.S. 389,397 (1973), and thus strictly presented no occasion for this court to explore Congress's authority to regulate interstate commerce through retroactive legislation. Indeed, the court acknowledged that "vested rights sometimes may be reached by retrospective legislation that is enacted as a reasonable exercise of the police power," 173 A.2d at 375, citing *Speert v. Morgenthau*, 73 App. D.C. 70, 74, 116 F.2d 301, 305 (1940) (in turn referencing Congress"s legitimate exercise

follow, inflexibly, a [prior] ruling [of the court] whose philosophical basis has been substantially undermined by subsequent Supreme Court decisions." *Frendak v. United States*, 408 A.2d 364,379 n.27 (D.C. 1979); *see also Kleinbart v. United States*, 604 A.2d 861, 870 (D.C. 1992) ("[w]hen intervening constitutional rulings necessitate a change in prior law, a division of this court is empowered to recognized that earlier decisions no longer have force."). For this reason, we decline to follow *Barrick's* holding or rationale and instead conclude that application of the PLCAA to the plaintiffs' pending cause of action under the SLA does not violate due process.

C. Takings

The plaintiffs contend, finally, that elimination of their cause of action by the PLCAA constitutes a "taking" for which the Fifth Amendment requires that they receive "just compensation." That compensation, they say, would be either the damages they can prove in a hypothetical suit against the defendants or, as they urged at oral argument, an order enjoining application of the PLCAA to their action.

---

of "the police power . . . within the field of interstate commerce," and pointing out that, "[a]lthough as a general rule vested rights cannot be impaired by retrospective legislation, this is not true in respect of regulation ender the police power"). *Barrick* may thus have relatively little to say about how the same court would have treated retroactive application of a statute by Congress designed to regulate an aspect of "the burdens and benefits of economic life" generally under the commerce clause. *Usery*, 428 U.S. at 15.

"[A] party challenging governmental action as an unconstitutional taking bears a substantial burden," *Eastern Enters.*, 524 U.S. at 523 (plurality opinion), a burden made even more demanding here because we have found no due process violation in the application of the PLCAA to pending actions. *See Concrete Pipe & Prods. of Calif. Inc. v. Constr. Laborers Pension Trust for S. Calif.*, 508 U.S. 602,641 (1993) (citation and internal quotation marks omitted) ("Given that [petitioner's) due process arguments are unavailing, it would be surprising indeed to discover [that] the challenged statute nonetheless violated the Takings Clause."). And still another obstacle the plaintiffs face is that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good," *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (internal citations omitted)—something Congress intended in enacting the PLCAA.

"There is no set formula to determine where [government] regulation"—as distinct from the "paradigmatic taking" of "direct government appropriation or physical invasion of private property," *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005)—"ends and taking begins." *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962). The plaintiffs argue that taking "has begun" here because (a) they concededly possessed a protectible "property" interest in their cause of action, one that "presumably can be surrendered for value," *Logan*,

455 U.S. at 431, and (b) Congress has flatly eliminated that cause of action if, as we have held, it does not fit within the predicate exception. But, as the Court observed in *Landgraf. supra,* the "Takings Clause prevents the Legislature . . . from depriving private persons of *vested* property rights" without just compensation, 511 U.S. at 266 (emphasis added), and so the determination of when that right in the form of a cause of action "vests" for due process purposes plainly has bearing on whether the plaintiffs' SLA action has been "taken" for constitutional purposes.

Among the federal courts cited earlier that have found no due process violation in Congress's abrogation of pending - but not final - causes of action, those that have addressed related taking claims have rejected them for essentially the same reasons. *See Grimsey v. Huff,* 876 F.2d 738, 743-44 (9th Cir. 1989); *In re Cansol. U.S. Atmospheric Testing Litig.,* 820 F.2d 982, 988-89 (9th Cir. 1987); *Iieto,* 421 F. Supp. 2d at 1299-1300 (absence of "final, unreviewable judgment" means that retroactive application of PLCAA to plaintiffs' actions "does not constitute a taking"); *O'Brien v. Kislak Mortgage Corp.,* 934 F. Supp. 1348, 1362 n.12 (S.D. Fla. 1996); *In re ABC-NACO, Inc.,* 331 B.R. 773, 779-80 (Bankr. N.D. Ill. 2005). In *In re Jones Truck Lines, Inc.,* 57 F,3d 642 (8th Cir. 1995), for example, the court rejected a claim that retroactive application of the Negotiated Rates Act to bar a carrier's pending claim against shippers for undercharges was an unconstitutional taking. "[A]ny economic impact based on the loss of causes of action is somewhat speculative," the court said (noting that "had the NRA not been enacted, shippers [might] have been

able to defeat the [carrier's] claims" anyway), because "[c]auses of action" are inchoate and "not fully vested interests until reduced to final judgments," and thus "the projected economic impact on [the carrier] is not sufficiently concrete to establish a taking." 57 F.3d at 651.

In these decisions, the courts have applied key factors that inform taking analysis, including "the character of the action and . . . the nature and extent of the interference," *Penn Central,* 438 U.S. at 130, in particular whether government "has interfered with distinct investment-backed expectations" that arc sufficient ""to constitute 'property'" for taking purposes. *Id.* at 124-25. Beyond the fact that the PLCAA involves no "physical invasion" of property but "instead merely affects property interests" through legislative altering of "the benefits and burdens of economic life to promote the common good," *Lingle,* 544 U.S. at 539 (citation and internal quotation marks omitted), the "inchoate" or contingent nature of the plaintiffs' cause of action persuades us that it is not "sufficiently bound up with . . . reasonable," "investment-backed expectations" to constitute property which the government has "taken." *Penn Central,* 438 U,S. at 124-25. The SLA does relax substantially traditional proof requirements for establishing tort liability, but still we recognized in *Beretta I* "the difficulties of proof the plaintiffs "may [yet] confront" in tying their injuries to an individual named defendant. *Beretta I,* 872 A.2d at 637. Since even "settled expectations" may be disturbed by Congress without effecting a taking, *Connolly v. Pension Benefit Gllar. Corp.,* 475 U.S. 211, 223 (1986) (quoting *Usery,* 428 U.S. at 16), the expectancy the plaintiffs have of a

successful outcome to their suit is not an interest the government is obliged to pay for as the price of eliminating it.

Moreover, while Congress unmistakably took away the specific cause of action the plaintiffs have alleged, that interference cannot be viewed "in a vacuum," *id.* at 225, but must be considered in the context of what Congress both did and did not do. As we explained in rejecting the plaintiffs' due process challenge, Congress left intact means by which persons injured by firearms may yet pursue civil liability against sellers or manufacturers - recourse significant to measuring "the severity of the economic impact of the [PLCAA]. *Id.*[11] The plaintiffs will view this as small comfort to them since they chose, as was their right, to pursue another cause of action with substantially reduced proof requirements. Yet one need only read the factual averments of their complaint to see how narrow is the difference between the liability they alleged (and which they are now precluded from showing) and theories Congress left available to them - and to ask, accordingly, whether the difference is of constitutional magnitude. The complaint, as we pointed out in *Beretta I,* alleges myriad ways by which distributors and dealers of firearms unlawfully sell firearms (through, for example, "straw purchases" or "kitchen sales") and that the defendants, knowing or constructively knowing of

---

[11] Congress, that is to say, has not worked the equivalent of a "total deprivation of beneficial use," *Lucas v. S. Carolina Coastal Counsel,* 505 U.S. 1003, 1017 (1992), in regard to redress that persons injured by firearms may have against manufacturers or sellers.

these practices, have done nothing to prevent them and have thus "create[ed], maintain[ed], or suppl[ied] the unlawful flow of firearms into the District." *See Beretta I*, 872 A.2d at 638. These allegations fall only modestly short of a claim that the defendants were complicit in the illegal practices, *i.e.*, "aided [and] abetted" others in selling firearms in contravention of federal or state law. 15 U.S.C. § 7903 (5)(A)(iii)(I11). Of course, the plaintiffs did not, and were not required to, sue under D.C. Code § 7-2531.02 or an equivalent theory alleging complicity in such "illegal sale[s]," but the preservation of these causes of action marks an important limitation on Congress's interference with the interests of the plaintiffs (and others similarly situated) seeking redress from manufacturers or sellers for injuries from the discharge of firearms. That limitation reinforces our conclusion that regulation did not "end" and taking "begin," *Goldblatt*, 369 U.S. at 594, when Congress abolished qualified civil liability actions, including the plaintiffs'.

IV.

For all of the above reasons, the judgment of the Superior Court is

Affirmed

APPENDIX B

JUDGMENT OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, CIVIL DIVISION (MAY 22, 2006)

DISTRICT OF COLUMBIA, *et al.*, Plaintiffs,
v.

BERETTA U.S.A. CORPORATION, et al.,
Defendants.

No. 2000 CA 00428 B

Honorable Brook Hedge

Judgment

In accordance with the Memorandum Opinion and Order Granting Defendants' Motion for Judgment on the Pleadings entered this date, it is by the Court, this 22nd day of May 2006, hereby

ORDERED and **ADJUDGED** that judgment in the above-captioned matter is entered in favor of Defendants.

APPENDIX C

MEMORANDUM OPINION AND ORDER OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, CIVIL DIVISION (MAY 22, 2006)

DISTRICT OF COLUMBIA, *et al.*, Plaintiffs,
v.

BERETTA U.S.A. CORPORATION, et al.,
Defendants.

No. 2000 CA 00428 B

Honorable Brook Hedge

Memorandum Opinion and Order Granting Defendants' Motion for Judgment on the Pleadings

This matter comes before the Court on Defendants' Motion for Judgment on the

Pleadings filed on October 27, 2005.[1] Plaintiffs filed an Opposition to Defendants' Motion on December 19, 2005, and oral argument was held on March 10, 2006.[2] Upon consideration of counsels' arguments, the Parties' filings, and the record in this case, the Court, for the reasons set forth below, grants Defendants' Motion.

I. Factual Background

A. Procedural History

Plaintiffs brought this action seeking compensatory damages and other equitable relief for conduct by Defendants that Plaintiffs alleged gave rise to liability under common law claims of negligence and public nuisance, as well as under D.C. Code § 7-2551.01 *et seq.* (2001), the Assault Weapon Manufacturing Strict liability Act of 1990 (the "Strict Liability Act"). The theory of liability underlying all three counts listed in the Complaint can be summarized as follows:

---

[1] Defendants, which consist of various manufacturers, importers, and distributors of firearms, are: Beretta U.S.A. Corp.; Fabbrica d'Armi Pietro Beretta, S.p.A.; Colt's Manufacturing Company LLC; Sturm, Roger & Co., Inc.; Glock Inc.; Glock Ges.m.b.H.; Hi-Point Firearms; H&R 1871, Inc.; Century International Arms, Inc.; KBI Inc.; Taurus International Manufacturing, Inc.; Forjas Taurus, S.A.; Heckler & Koch, Inc.; Heckler & Koch GmbH; Phoenix Arms; Browning Arms Co.; Sigarms; and Smith & Wesson Corp.

[2] Plaintiffs consist of nine individuals and the District of Columbia.

Although the District of Columbia itself has stringent gun control laws, there nonetheless exists an unchecked illegal flow of firearms into the District to which the defendants by action and inaction have contributed. This flow of guns takes place in numerous ways, including "straw purchases" (purchases from licensed dealers on behalf of other persons not qualified to buy under applicable law), multiple sales (multiple purchases over a short stretch of time by persons intending to sell or transfer to others not qualified to buy), sales by the defendants to "kitchen table" dealers licensed to sell but who do not do so from retail stores, and gun show sales by sellers who typically lack federal firearm licenses and are not required to do purchaser background checks. . . . [D]efendants have

distributed their firearms without adequate self-regulation or supervision in order to increase firearm sales, knowing or constructively knowing they are creating, maintaining, or supplying the unlawful flow of firearms into the District and similarly knowing those guns will be used to commit crimes such as the ones that have caused death or injury to the individual plaintiffs or persons they represent. . . . [D]efendants are able to restrict or impede the unlawful flow of firearms into the District but have not done so.

District of Columbia v. Beretta, U.S.A., Corp., 872 A.2d 633, 638 (D.C. 2005) (en banc), *cert. denied*, 126 S. Ct. 399 (2005).

Defendants responded by filing a motion for judgment on the pleadings seeking dismissal of the suit. On December 16, 2002, Judge Long entered judgment for Defendants and dismissed the action. Judge Long concluded that Plaintiffs' claims of negligence and public nuisance failed basic tests of duty, foreseeability, and remoteness as pleaded; that the District could not bring an action under the Strict Liability Act; and that the individual Plaintiffs did not plead sufficiently their claims under the Strict Liability Act, which, in any event, Judge Long determined to be an unconstitutional exercise of extra-territorial regulation by the District. *Id.* at 637.

On appeal, the District of Columbia Court of Appeals upheld Judge Long's decision as to Plaintiffs' claims of negligence and public nuisance, but reversed her decision as to the District's and the individual Plaintiffs' claims under the Strict Liability Act. *Id.* at 637-38. The court held that the individual Plaintiffs may advance to discovery to attempt to prove their claims under the Strict Liability Act, and the District, though not authorized to bring an action under the Strict Liability Act, may remain in the case for the limited purpose of seeking subrogated damages as to the individual Plaintiffs for whom it has incurred medical expenses. *Id.* at 637. The court further held the Strict Liability Act to be constitutional. *Id.* at 655-59. Although the court allowed the individual Plaintiffs to advance to discovery, the court held that if Plaintiffs are unable to tie a particular defendant to a particular injury-

producing weapon after discovery, they will not be entitled to proceed under the Strict Liability Act. *Id.* at 655. The court, therefore, remanded the case for further proceedings consistent with its opinion. *Id.* at 659.

B. Allegations Comprising Plaintiffs' Strict Liability Claims[3]

Plaintiff Bryant Lawson, a 19-year-old resident of the District, was shot and paralyzed in Northeast Washington on January 26, 1997, with a semi-automatic firearm. He was shot near his home as he tried to flee from three armed men. The bullets recovered from Plaintiff Lawson were determined to be either .380 or 9 mm caliber and most likely were fired by a "machine gun," as defined by the Strict Liability Act. Plaintiff Lawson is now a quadriplegic and has relied on Medicaid to pay for the surgery, hospitalization, medications and rehabilitation he has needed because of his gunshot wounds.

Helen Foster-el, former wife of Plaintiff James Foster-el and mother of Plaintiff Michelle Foster-el, was shot and killed in the East Capitol Dwellings housing project in the District on June 21, 1999, during a dispute between neighboring youths armed with handguns. Two of the youths had been armed with 9 mm handguns that had been outfitted with an

---

[3] The following facts are taken from allegations contained in Plaintiffs' Third Amended Complaint for Damages and Injunctive Relief (the "Complaint"). For purposes of this order, the facts contained in the Complaint are taken as true. *See Blake v. Prof'l Travel Corp.*, 768 A.2d 568, 569 (D.C. 2001).

extended cartridge and loaded with hollow point bullets. Once the dispute began, and the firing commenced, residents of the community scattered. As she was guiding a child into a house, Helen Foster-el was shot twice, once in the back and once in the leg. Helen Foster-el died at the scene from her wounds; one of her daughters, Prudence Foster-el, was with her as she died on the porch. The bullets that killed Helen Foster-el were fired by one or more "machine guns" or "assault weapons," as defined by the Strict Liability Act.

Mary Caitrin Mahoney, daughter of Plaintiff Patrick H. Mahoney, was shot and killed in a Starbucks Coffee store in Georgetown on July 6 or 7, 1997, during an attempted armed robbery. Ms. Mahoney was shot multiple times with a .380 caliber semi-automatic handgun, and at least once with a .38 caliber revolver, after refusing to surrender the keys to the store safe. Ms. Mahoney was 24 years old at the time of her death. Both weapons used to kill Ms. Mahoney are considered "machine guns" or "assault weapons," as defined by the Strict Liability Act.

Andre Wallace, son of Plaintiff Laura Wallace, and Natasha Marsh, daughter of Plaintiff Madilia R. Marsh-Williams, were shot and killed in the driveway of Marsh's home in Northeast Washington on February 8, 2000, while they were unloading groceries. They were both 17 years old and seniors at Wilson High School. At least one 9 mm bullet was recovered from both of the victims' bodies, each having been fired by a "machine gun" or "assault weapon," as defined by the Strict Liability Act.

Plaintiffs Ahmad Vaughan, Avery Blue, and Gregory Ferguson were shot on June 17, 1998, on the 1300 block of Congress Street in Southeast Washington. While the three Plaintiffs were chatting in front of Vaughan's home, a gang of young men in masks, armed with a pump shotgun, a 9 mm, and an AK-47, opened fire on Vaughan, Blue, and Ferguson. All three Plaintiffs were shot at least once by the AK-47, a weapon that qualifies as a "machine gun" or "assault weapon," as defined by the Strict Liability Act. Vaughan, Blue, and Ferguson each spent several days at the Washington Hospital Center and have each experienced physical and emotional difficulties since the incident.

Plaintiffs allege that Defendants are strictly liable under the Strict Liability Act for having manufactured, imported, or sold one or more assault weapons or machine guns that have been discharged in the District resulting in deaths and bodily injuries. Plaintiffs claim that Defendants are strictly liable to the District for (1) health care costs and Medicaid expenses the District has incurred for care and treatment of victims of this gun violence; and (2) costs of other assistance and compensation provided or paid by the District to police officers, firefighters, and other District employees who have suffered injuries from this gun violence. Plaintiffs also claim that Defendants are strictly liable to the individual Plaintiffs for various compensatory damages proximately caused by Defendants' conduct.

C. The Protection of Lawful Commerce in Arms Act

On October 26, 2005, the President signed into law the Protection of Lawful Commerce in Arms Act (the "PLCAA"), 15 U.S.C. §§ 7901-7903, Pub. L. No. 109-92, 119 Stat. 2095. The PLCAA provides for the "immediate dismissal" of any pending "qualified civil liability action."[4] 15 U.S.C. § 7902(b). The PLCAA defines a "qualified civil liability action" as:

> [A] civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a [firearm], or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a [firearm] by the person or a third party[.]

Id. § 7903(5)(A). The PLCAA, however, provides six exceptions to the definition of a "qualified civil liability action." *Id.* § 7903(5)(A)(i)-(vi). The exception applicable in this case excludes the following from the definition of a "qualified civil liability action": "[A]n action in which a manufacturer or seller of a [firearm] knowingly violated a State[5] or Federal statute applicable to the sale or marketing of the

---

[4] The PLCAA's prohibition of a "qualified civil liability action" applies to both state and federal courts. *See* 15 U.S.C. § 7902(a)-(b).

[5] The PLCAA defines the District of Columbia as a "State" for purposes of the statutory exception and other provisions of the Act. 15 U.S.C. § 7903(7).

[firearm], and the violation was a proximate cause of the harm for which relief is sought[.]" *Id.* § 7903(5)(A)(iii) (the "predicate exception").[6] Accordingly, firearm manufacturers, dealers, sellers, or importers are not protected by the PLCAA if the civil action brought against them falls within this exception.[7]

---

[6] For purposes of uniformity, the Court uses the same term ("predicate exception") to label this exception as has been used in both federal court cases addressing the PLCAA. *See Ileto v. Glock, Inc.*, 2006 U.S. Dist. LEXIS 12153, *19 (C.D. Cal. March 14, 2006); *City of New York v. Beretta U.S.A. Corp.*, 401 F. Supp. 2d 244, 269 (E.D.N.Y. 2005).

[7] The full text of the predicate exception is as follows:

> (iii) an action in which a manufacturer or seller of a [firearm] knowingly violated a State or Federal statute applicable to the sale or marketing of the [firearm], and the violation was a proximate cause of the harm for which relief is sought, including–
>
> (I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or
>
> (II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a

On October 27, 2005, the day after the PLCAA was signed into law, Defendants filed their Motion for Judgment on the Pleadings asking the Court to dismiss this case. Defendants argue that the PLCAA requires immediate dismissal of this action because Plaintiffs' claims under the Strict Liability Act fall squarely under the PLCAA's definition of a "qualified civil liability action."

Plaintiffs oppose Defendants' motion on the grounds that this case falls within the predicate exception and, therefore, is not required to be dismissed under the PLCAA. In the alternative, Plaintiffs argue that if the Court were to find that this action does not fall within the predicate exception and, therefore, hold that the PLCAA does require dismissal of this action, the PLCAA is unconstitutional as applied. Upon Plaintiffs' challenge to the constitutionality of the PLCAA, the United States intervened for the limited purpose of defending the PLCAA's constitutionality. *See* 28 U.S.C. § 2403(a); Super. Ct. Civ. R. 24-I.

II. Legal Standard

A party may move for judgment on the pleadings "[a]fter the pleadings are closed but within such time

---

> qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of title 18, United States Code[.]

15 U.S.C. § 7903(5)(A)(iii)(I)-(II).

as not to delay trial." Super. Ct. Civ. R. 12(c). "If . . . matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56[.]" *Id.* The standard for disposition of a motion for judgment on the pleadings is identical to that of a Rule 12(b)(6) motion to dismiss. *See Beretta*, 872 A.2d at 639 (citing *Osei-Kuffnor v. Argana*, 618 A.2d 712, 713 (1993)).

When reviewing a motion for judgment on the pleadings, a court must construe all facts and inferences in the light most favorable to the non-moving party, and the allegations in the complaint are taken as true. *Id.* The "purpose of a [Rule 12(c)] motion is to test the formal sufficiency of a statement of the claim for relief; it is not a procedure for resolving a contest about the facts or merits of the case." *Fraser v. Gottfried*, 636 A.2d 430, 432 (D.C. 1994) (quoting C. Wright & A. Miller, *Federal Practice and Procedure* § 1356, at 294 (2d ed. 1990)) (internal quotations omitted). A court may not grant the motion "unless it appears that [the] plaintiff can prove no facts in support of the claim which would entitle the plaintiff to relief." *Vincent v. Anderson*, 621 A.2d 367, 372 (D.C. 1993).

III. Discussion

Defendants argue that this action must be dismissed as a "qualified civil liability action" under the recently enacted PLCAA. Plaintiffs advance two arguments in their Opposition to Defendants' motion: (1) that the PLCAA is not applicable to this case because Plaintiffs' causes of action under the Strict Liability Act fall within the predicate exception contained in the PLCAA; and (2) if the

PLCAA is held to be applicable, then the statute is unconstitutional as applied. The Court will address Plaintiffs' arguments in turn.

A. Applicability of the PLCAA

Plaintiffs have brought a civil action against sellers and manufacturers of specified firearms for damages resulting from the criminal or unlawful misuse of such firearms by a third party. Plaintiffs cannot dispute that, absent an applicable exception, the present action falls within the PLCAA's definition of a "qualified civil liability action." *See* 15 U.S.C. § 7903(5)(A). As noted above, the PLCAA requires the "immediate dismissal" of any "qualified civil liability action" pending in any state or federal court. *Id.* § 7902(a)-(b). The statute, however, exempts from dismissal any action in which a seller or manufacturer of firearms knowingly violated a state statute "applicable to the sale or marketing" of firearms and such violation was a proximate cause of the harm for which relief is being sought. *Id.* § 7903(5)(A)(iii). Accordingly, to avoid dismissal under the PLCAA, Plaintiffs must plead (1) a knowing violation (2) of a state or federal statute applicable to the sale or marketing of firearms, (3) which proximately caused the alleged injuries. If the allegations contained in the Complaint fail to satisfy any one of these three requirements, the action must be dismissed pursuant to § 7902(b) of the PLCAA.

Plaintiffs argue that this case falls within the predicate exception because their claims arise under the Strict Liability Act, which, according to Plaintiffs, is a state statute "applicable to the sale or marketing" of firearms. According to Plaintiffs, the plain language of the Strict Liability Act makes clear

that the statute is applicable to the sale or marketing of firearms and, therefore, falls squarely within the predicate exception. Defendants, in contrast, argue that the purpose and policy of the PLCAA as a whole, the plain and unambiguous language of the statutory exception, and well-established principles of statutory construction dictate that the Strict Liability Act is not the type of state statute contemplated in the predicate exception.

The first step in interpreting a statute is to look at the language of the statute. *Jeffrey v. United States*, 878 A.2d 1189, 1193 (D.C. 2005). A court is required to give effect to the statute's plain meaning if the words are clear and unambiguous. *Id.* In interpreting the text of a statute, "it is axiomatic that the words of a statute should be construed according to their ordinary sense and with the meaning commonly attributed to them." *Id.* (citation omitted). A court, however, "must not 'make a fetish out of plain meaning' and . . . where the literal meaning of the statutory language is 'plainly at variance with the policy of the legislation as a whole,' [the court] should not follow it." *Allman v. Snyder*, 888 A.2d 1161, 1168 (D.C. 2005) (quoting *In re Perrin*, 663 A.2d 517, 523 (D.C. 1995)). Statutory interpretation requires that a court "remain more faithful to the purpose [of the statute] than the word." *Jeffrey*, 878 A.2d at 1193 (citation omitted).

1. Plain Language of the Predicate Exception

As noted above, the predicate exception exempts from dismissal "an action in which a manufacturer or seller of a [firearm] knowingly violated a State or

Federal statute applicable to the sale or marketing of the [firearm], and the violation was a proximate cause of the harm for which relief is sought[.]" 15 U.S.C. § 7903(5)(A)(iii). Plaintiffs' only remaining claims against Defendants are for various compensatory damages under the Strict Liability Act. The Strict Liability Act provides that:

> Any manufacturer, importer, or dealer of an assault weapon or machine gun shall be held strictly liable in tort, without regard to fault or proof of defect, for all direct and consequential damages that arise from bodily injury or death if the bodily injury or death proximately results from the discharge of the assault weapon or machine gun in the District of Columbia.

D.C. Code § 7-2551.02 (2001) *formerly* D.C. Code § 6-2392 (1981). The question for the Court to consider is whether the Strict Liability Act is the type of state statute "applicable to the sale or marketing" of firearms that Congress intended to include in the predicate exception.

Since the passage of the PLCAA, two federal courts have considered whether certain statutes were predicate exceptions. *See Ileto v. Glock, Inc.*, 2006 U.S. Dist. LEXIS 12153 (C.D. Cal. March 14, 2006); *City of New York v. Beretta U.S.A. Corp.*, 401 F. Supp. 2d 244 (E.D.N.Y. 2005). In those cases, whether the plaintiffs' claims under the respective state statute fell within the predicate exception turned primarily on the meaning of the word "applicable." Both cases involved state statutes that were not specifically or exclusively applicable to firearm manufacturers or sellers; rather, the statutes

at issue were general public nuisance and negligence statutes. *See Ileto*, 2006 U.S. Dist. LEXIS at *58; *City of New York*, 401 F. Supp. 2d at 261.[8] Accordingly, to determine whether the respective state statutes were "applicable to the sale or marketing" of firearms, each court had to determine whether the word "applicable" should be interpreted in a broad or narrow fashion.

Both courts examined the dictionary definition of the word "applicable" and came to opposite conclusions. The court in *Ileto* determined that the word "applicable" was ambiguous when considered in the context of the entire statutory scheme and should be interpreted narrowly to include only state statutes that are specifically applicable to the sale or marketing of firearms. *Ileto*, 2006 U.S. Dist. LEXIS at *26, *57-58. In contrast, the court in *City of New York* determined that the word "applicable" was unambiguous and readily understandable as "capable of being applied." *City of New York*, 401 F. Supp. 2d at 263-64. Accordingly, the court determined that because the New York criminal nuisance statute was *capable* of being applied to

---

[8] The California statutes at issue in *Ileto* were (1) California Civil Code section 1714(a), which establishes a general duty of care by which all in California must abide; (2) California Civil Code section 3479, which embodies California's definition of a nuisance; and (3) California Civil Code section 3480, which sets forth what constitutes a public nuisance. *Ileto*, 2006 U.S. Dist. LEXIS at *58. The New York statute at issue in *City of New York* was New York Penal Law section 240.45, a criminal nuisance statute. *City of New York*, 401 F. Supp. 2d at 261.

firearm manufacturers or sellers, the plaintiffs' claims fell within the predicate exception. *Id.* at 264.

Both of those cases, however, involved materially different statutes. In this case, the Strict Liability Act is specifically and exclusively applicable to firearm manufacturers and sellers. Regardless of which dictionary definition of the word "applicable" is considered, there can be no doubt that, like the examples given in the predicate exception, the Strict Liability Act is a state statute that applies specifically and exclusively to the firearms industry. *See* 15 U.S.C. § 7903(5)(A)(iii)(I)-(II). Certainly, on its face, the Strict Liability Act is applicable to the sale of firearms. If a manufacturer, importer, or dealer[9] sells any firearm covered by the Strict Liability Act, and the discharge of that firearm in the District is the proximate cause of any bodily injury or death, that manufacturer, importer, or dealer is strictly liable under the statute.

2. Purpose of the PLCAA

Although, under a literal interpretation of the predicate exception, causes of action brought under the Strict Liability Act would seem to be excluded from the PLCAA's definition of a "qualified civil liability action," the Court must consider whether

---

[9] The term "seller" as used in the PLCAA is synonymous with the terms "dealer" and "importer" as used in the Strict Liability Act. The PLCAA defines "seller" as a "dealer" or "importer" as defined in 18 U.S.C. § 921(a)(9) & (11), which is the same statute the Strict Liability Act uses to define "dealer" and "importer." *See* 15 U.S.C. § 7903(6)(A)-(B); D.C. Code § 7-2551.01(3).

the purpose of the PLCAA requires the Court to look beyond a literal interpretation of the Act. *See Allman*, 888 A.2d at 1168 ("[W]here the literal meaning of the statutory language is plainly at variance with the policy of the legislation as a whole, [the court] should not follow it.") (citation and internal quotations omitted). When taken as a whole and in the context of the purpose of the PLCAA, the Court must determine whether the predicate exception was meant to include any state statute that applies to a result of the sale or manufacture of firearms, or whether it was meant to include only those state statutes that apply to the *manner* in which firearms are marketed or sold.

Congress has made clear that manufacturers or sellers of firearms or ammunition products that have been shipped or transported in interstate commerce "are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended." 15 U.S.C. § 7901(a)(5). The imposition of such liability, according to Congress, "is an abuse of the legal system, erodes public confidence in our Nation's laws . . . invites the disassembly and destabilization of other industries and economic sectors lawfully competing in the free enterprise system . . . and constitutes an unreasonable burden on interstate and foreign commerce of the United States." *Id.* § 7901(a)(6). Accordingly, Congress has plainly stated that the purpose of the PLCAA is to prohibit lawsuits attempting to impose such liability. *See Id.* § 7901(b)(1).[10] The Court agrees with the court's

---

[10] Section 7901(b)(1) states:

statement in *Ileto* that "the clear purpose of the PLCAA was to shield firearms manufacturers and dealers from liability for injuries caused by third parties using nondefective . . . firearms." *Ileto*, 2006 U.S. Dist. LEXIS at *35.[11]

The Strict Liability Act is a statute that imposes the type of liability that Congress has attempted to prohibit by enacting the PLCAA. The Strict Liability Act holds manufacturers or sellers of specified firearms strictly liable for injuries caused by the criminal or unlawful misuse of such firearms by third parties, regardless of whether or not the firearm functioned as designed and intended. *See*

> The purposes of this Act are as follows . . . [t]o prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended.

15 U.S.C. § 7901(b)(1). Indeed, the description of the PLCAA under its heading is: "To prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages, injunctive or other relief resulting from the misuse of their products by others." *See* PLCAA, Pub. L. No. 109-92, 119 Stat. 2095.

[11] The Court does not find it necessary to use extrinsic aids such as the legislative history of the PLCAA in light of *Allman*.

D.C. Code § 7-2551.02. Therefore, the Strict Liability Act runs head on into the PLCAA's prohibitions.

"It is well established that 'when the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to
enforce it according to its terms.'" *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)). Where the literal interpretation of a statutory term would lead to an absurd result, courts must search for other evidence of congressional intent to lend the term its proper scope. *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 454 (1989); *see also Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892) ("It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.").

3. Rules of Statutory Construction

The types of state statutes "applicable to the sale or marketing" of firearms that Congress meant to include within the predicate exception are evidenced by the limiting language of the provision. Included within the predicate exception, by the connecting term "including," are specific cases that Congress has determined to be covered by the predicate exception. See footnote 7. Under the doctrine of *ejusdem generis*, where specific words follow general words, the application of the general term is restricted to things that are similar to those specifically enumerated. *See* 2A N. Singer, *Sutherland Statutory Construction* § 47.17 (5th ed. 1992).

Defendants rely on *Molloy v. Metro. Transp. Auth.*, 94 F.3d 808 (2d Cir. 1996) and *United States v. Phillip Morris USA, Inc.*, 396 F.3d 1190 (D.C. Cir. 2005), to support their argument that principles of statutory interpretation require the Court to read the statutory exception in the context of the specific violations that are included within the exception. In *Molloy*, the Second Circuit was faced with the issue of whether staff reductions at thirty-two Long Island Railroad stations constituted an "alteration" to such stations under the American with Disabilities Act. *Molloy*, 94 F.3d at 811-12. The statutory text at issue provided that the ADA applied only to "alterations of an existing station or part thereof." *Id.* at 811; 42 U.S.C. § 1216(e)(2)(B)(i) (1994). The Secretary of Transportation had promulgated regulations defining the term "alteration" as: "[A] change to an existing facility, including, but not limited to, remodeling, renovation, rehabilitation, reconstruction, historic restoration, changes or rearrangement in structural parts or elements, and changes or rearrangement in the plan configuration of walls and full height partitions." *Id.*; 49 C.F.R. § 37.3. Noting that the regulation lists only physical modifications of a relatively permanent nature, the court held that "[u]nder the common sense approach to interpreting a general provision in the light of a list of specific illustrative provisions, ejusdem generis, we conclude the general term (here 'change') to include only things similar to the specific items in the list." *Id.* at 812. Accordingly, the court held that staff reductions at the specified stations did not constitute an alteration because such a change is not physical or permanent in nature. *Id.*

In *Phillip Morris*, the court was presented with the question of whether the District Court had jurisdiction to entertain a claim for disgorgement under RICO. *Phillip Morris*, 396 F.3d at 1197-1202. Under 18 U.S.C. § 1964(a), a District Court is granted jurisdiction to enter a variety of orders "to prevent and restrain" RICO violations. *Id.* at 1198. The appellants argued that the language of § 1964(a) indicates that jurisdiction is granted to the District Court to issue forward-looking remedies aimed at future violations; disgorgement, on the other hand, is a quintessential backward-looking remedy focused on remedying the effects of past conduct. *Id.* In agreeing with the appellants, the court determined under the principles of *ejusdem generis* and *noscitur a sociis* that the remedies explicitly listed in the statute, introduced by the words "including, but not limited to[,]" were all directed towards future conduct and, therefore, served to limit the remedies available under § 1964(a).[12] *Id.* at 1200. The court

---

[12] Section 1964(a) states:

> The district courts . . . shall have jurisdiction to prevent and restrain violations of section 1962 . . . by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

held that disgorgement was not a remedy directed towards future conduct and, therefore, did not fall within the available remedies of § 1964(a). *Id.*

In this case, the specific cases given as examples in the predicate exception are clearly those involving violations of statutes regulating the *manner* in which firearms are sold or marketed. *See* 15 U.S.C. § 7903(5)(A)(iii)(I)-(II). The specific examples listed deal with violations of statutes imposing various record keeping and disclosure requirements in regards to the sale or marketing of firearms. Accordingly, the state statutes "applicable to the sale or marketing of firearms" that are mentioned in the general part of the predicate exception are limited to state statutes regulating the manner in which firearms are sold or marketed, and not statutes that are merely capable of being applied to the result of the sale or marketing of firearms.

In conclusion, the Court is faced with a classic tension between two elected branches of different governments, two equally clear legislative judgments, but each embodying opposite policies. On the one hand, the District of Columbia City Council has determined that assault weapons "have little or no social benefit but at the same time pernicious consequences for the health and safety of District residents and visitors." *Beretta*, 872 A.2d at 657 (citing the Strict Liability Act § 2(2), D.C. Law 8-263 [Act 8- 289], § 2, 37 DCR 8482 (Dec. 28, 1990)). On the other hand, the United States Congress has trumped local law by passing legislation to protect the profits of such manufacturers, a legislative judgment it is equally entitled to impose. At bottom, Congress enacted the PLCAA to prohibit the very

types of lawsuits that the Strict Liability Act allows. The Court cannot interpret the predicate exception in such a manner that leads to a result that is plainly at variance with the federal legislation as a whole. Statutory interpretation requires that a court "remain more faithful to the purpose [of the statute] than the word." *Jeffrey*, 878 A.2d at 1193 (citation omitted). Accordingly, the Court holds that the Strict Liability Act is not a state statute "applicable to the sale or marketing" of firearms, and, therefore, Plaintiffs' causes of action under the Strict Liability Act do not fall within the predicate exception. Therefore, judgment must be granted for the Defendants unless the Court finds the PLCAA to be unconstitutional.

B. Constitutionality of the PLCAA

Plaintiffs challenge the constitutionality of the PLCAA claiming that the statute violates: (1) fundamental principles of separation of powers; (2) the Fifth Amendment's Due Process and Takings Clauses; (3) principles of equal protection; and (4) Plaintiffs' fundamental right of access to the courts. At the outset, the Court notes that congressional enactments are afforded a presumption of constitutionality, and a court will invalidate such enactments only upon a plain showing that Congress has exceeded its constitutional bounds. *United States v. Morrison*, 529 U.S. 598, 607 (2000). Statutes "adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and . . . the burden is on one complaining of a [constitutional] violation to establish that the legislature has acted in an arbitrary and irrational way." *Eastern Enters. v. Apfel*, 524 U.S. 498, 524 (1998) (quoting *Usery v.*

Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976)) (internal quotations omitted). The Court addresses Plaintiffs' constitutional arguments in turn, and for the reasons set forth below, finds the PLCAA constitutional.

1. Separation of Powers

Plaintiffs argue that § 7902(b) of the PLCAA, which requires that "qualified civil liability action[s]" be "immediately dismissed" by the courts, is an unconstitutional intrusion on judicial authority in violation of the principle of separation of powers. Plaintiffs claim that the PLCAA's "immediate dismissal" provision is an attempt by Congress to decide cases, without amending the underling substantive law, by requiring courts to dismiss – and thus resolve in Defendants' favor – any "qualified civil liability action" pending on the date the Act is passed. Plaintiffs argue that this is a direct violation of the rule stated in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), which, according to Plaintiffs, stands for the proposition that Congress may not direct the outcome of pending cases without changing the underlying substantive law.

a. *Klein* Principle

In *Klein* an executor of the estate of a Confederate sympathizer sought to recover, under federal law, the value of property seized by the United States during the Civil War. *Klein*, 80 U.S. at 136. Such property was recoverable upon proof of loyalty to the Union, which the Supreme Court had held, in a prior case, could be established by proof of presidential pardon. *Id.* at 142-43. In *Klein*, the Confederate sympathizer had received a presidential pardon;

accordingly, the Court of Claims ruled in his favor. *Id.* at 143. While the case was pending on appeal, however, Congress enacted a law providing that a pardon would instead be taken as proof that the pardoned individual had in fact aided the Confederacy, and, if evidence of such a pardon was offered by the claimant, the court must dismiss the case for lack of jurisdiction. *Id.* at 143-44.

The Court in *Klein* held that the law enacted by Congress purported to "prescribe rules of decision to the Judicial Department" without creating "new circumstances" to which the Court would be left to apply its ordinary rules, and, therefore, violated the doctrine of separation of powers. *Id.* at 146-47. The Court conceded that Congress certainly has the right to limit the Court's appellate jurisdiction, "[b]ut the language of the [statute] shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end." *Id.* at 145. According to the Court, the purpose of the law was "to deny to pardons granted by the President the effect which this court had adjudged them to have." *Id.* The denial of jurisdiction to the Court was "founded solely on the application of a rule of decision, in causes pending, prescribed by Congress[,]" which, according to the Court, "is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power." *Id.* Ultimately, the Court concluded that the federal law was merely an attempt "to prescribe a rule for the decision of a cause in a particular way[.]" *Id.* The statute did not require the Court to apply any new substantive law created by the statute, but merely prohibited the Court "to give the effect to evidence which, in its own judgment, such evidence should

have, and . . . directed [the Court] to give it an effect precisely contrary." *Id.* at 147.

Some courts have interpreted *Klein* as standing for "the principle that Congress cannot direct the outcome of a pending case without changing the law applicable to that case." *Paramount Health Sys., Inc. v. Wright*, 138 F.3d 706, 710 (7th Cir. 1998); *see also Ruiz v. United States*, 243 F.3d 941, 948 (5th Cir. 2001) (citing *Klein* and stating that "[t]he separation of powers principles inherent in Article III prohibit Congress from adjudicating particular cases legislatively."); *Hadix v. Johnson*, 144 F.3d 925, 940 (6th Cir. 1998) ("[T]he Legislature may not impose a rule of decision for pending judicial cases without changing the applicable law."); *Mount Graham Coalition v. Thomas*, 89 F.3d 554, 557-58 (9th Cir. 1996) (noting that Klein stands for the proposition that Congress is prohibited from "directing a particular decision in a case without repealing or amending the law underlying the decision."); *see also Ecology Ctr. v. Castaneda*, 426 F.3d 1144, 1149 (9th Cir. 2005) (citing a Ninth Circuit case interpreting *Klein* and noting that the doctrine of separation of powers is not violated even if the statute "affects, or is even directed at, a specific judicial ruling so long as the legislation modifies the law."). The precise scope and meaning of *Klein* has not been fully established by the Supreme Court, but it is undisputed that "its prohibition does not take hold when Congress 'amend[s] applicable law.'" *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995)

(quoting *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 441 (1992)).[13]

b. Congressional Amendment of Applicable Law

Plaintiffs argue that the PLCAA directs the courts to dismiss "qualified civil liability action[s]" without amending the underlying substantive law or setting out new substantive legal standards for the judiciary to apply. According to Plaintiffs, the PLCAA has two commands: (1) it forbids the filing of any "qualified civil liability action" in any court; and (2) it directs the immediate dismissal of any pending "qualified civil liability action." Plaintiffs argue that the PLCAA only consists of definitions that are

---

[13] The sweeping language of *Klein* seems to cast doubt on Congress' power to "prescribe rules of decision to the judicial department of the government in cases pending before it." *Klein*, 80 U.S. at 146. "Such dicta, however, are troublesome inasmuch as the prescription of general rules of substantive law lies at the heart of the legislative function, and courts are obliged to apply the positive law in effect at the time of the judgment." *United States v. Brainer*, 691 F.2d 691, 695 (4th Cir. 1982) (citing P. Bator, D. Shapiro, P. Mishkin & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System*, 316 n.4 (2d ed. 1973). The better construction of *Klein* may be that the case only holds only that "Congress violates the separation of powers when it presumes to dictate 'how the Court should decide an issue of fact (under threat of loss of jurisdiction)' and purports 'to bind the Court to decide a case in accordance with a rule of law independently unconstitutional on other grounds.'" *Id.* (citing Bator, Shapiro, Mishkin & Wechsler, *supra*, 316 n.7).

entirely internal to the statute itself, and although a court must apply the definitions to determine whether the statute controls, the definitions do not modify, affect, or amend any external, underlying law.

In *Miller v. French*, 530 U.S. 327 (2000), the issue before the Court was whether § 3626(e)(2) of the Prison Litigation Reform Act of 1995 ("PLRA"), which, under certain circumstances, dictated automatic stays of court ordered injunctions, was unconstitutional because it mandated a particular rule of decision in violation of the principle of separation of powers established under *Klein*. *Miller*, 530 U.S. at 333-35. The PLRA established standards for the entry and termination of prospective relief in civil actions challenging prison conditions. *Id.* at 331. If prospective relief, existing under a court ordered injunction, did not satisfy the standards of the PLRA, a defendant was entitled to immediate termination of that relief. *Id.* Section 3626(e)(2) provided that if a motion to terminate prospective relief was filed with a court, an automatic stay was imposed staying the relief for a period beginning 30 days after the filing of the motion and ending when the court ruled on the motion. *Id.* The provision was challenged, and the lower court held that it was unconstitutional because it directed "a particular rule of decision, at least during the pendency of the . . . termination motion, contrary to *United States v. Klein*[.]" *Id.* at 335.

Upon review, the Court held that § 3626(e)(2) was not unconstitutional under *Klein* because it worked to amend the applicable underlying law. *Id.* at 349. The Court took no position on the precise scope of

Klein, but indicated that the prohibitions of *Klein* do not take hold when Congress amends the applicable underlying law. *Id.* According to the Court, § 3626(e)(2), when read in conjunction with the new standards set forth by the PLRA for the continuation of prospective relief, amounted to an amendment to the underlying applicable law. *Id.* The Court stated:

> The prisoners . . . contend that, because § 3626(e)(2) does not itself amend the legal standard, *Klein* is still applicable. As we have explained, however, § 3626(e)(2) must be read not in isolation, but in the context of § 3626 as a whole. Section 3626(e)(2) operates in conjunction with the new standards for the continuation of prospective relief; if the new standards of § 3626(b)(2) are not met, then the stay "shall operate" unless and until the court makes the findings required by § 3626(b)(3). Rather than prescribing a rule of decision, § 3626(e)(2) *simply imposes the consequences of the court's application of the new legal standard.*

Id. (emphasis added).

In *Robertson*, Congress, in response to pending litigation challenging various efforts of the federal government to allow harvesting and sale of timber from old-growth forests in the Pacific Northwest, passed a statute that specifically provided that management of the areas of forest at issue, in accordance with the standards set forth in the statute, was "adequate consideration for the purpose of meeting the statutory requirements that [were] the basis" of the pending litigation. *Robertson*, 503

U.S. at 431-35.[14] The effect of the statute was to provide the federal government with a set of statutory standards that, if followed, would then operate to satisfy the government's obligations under various other statutory standards that were the basis of the pending litigation. *See Id.* at 437-38. The Court, upon review, was presented with the question of whether the federal statute violated the principle of separation of powers under *Klein* "because it purported to direct the results in two pending cases" without amending the law underlying the litigation. *Id.* at 436.

The Court held, without reaching the question of whether the lower court's interpretation of *Klein* was

---

[14] The statute provided:

> The Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain northern spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned *Seattle Audubon Society et al., v. F. Dale Robertson*, Civil No. 89-160 and *Washington Contract Loggers Assoc. et al., v. F. Dale Robertson*, Civil No. 89-99 (order granting preliminary injunction) and the case *Portland Audubon Society et al., v. Manuel Lujan, Jr.*, Civil No. 87-1160-FR.

Robertson, 503 U.S. at 434-35.

correct,[15] that the newly enacted statute was not a violation of separation of powers because it did amend applicable law and did not direct any particular findings of fact or applications of law to fact. *Id.* at 438-39. The Court reasoned that, prior to the enactment of the new provision, the claims in the pending litigation would fail only if the challenged government action violated none of five old provisions, whereas, after the enactment of the new provision, those same claims would fail only if the government action failed to violate neither of *two* new provisions. *Id.* at 438 (emphasis added). According to the Court, the newly enacted statutory provisions effected a modification of the old provisions. *Id.* Furthermore, the Court found nothing in the new provision that purported to direct any particular findings of fact or applications of law to fact. *Id.* For example, the new provision "expressly reserved judgment upon 'the legal and factual adequacy' of the administrative documents authorizing the sales[]" and also "expressly provided for *judicial* determination of the lawfulness of those sales." *Id.* at 438-39 (emphasis in original).

Like the statutes at issue in *Miller* and *Robertson*, the PLCAA works to provide a new legal standard for courts to apply. The statute defines a new class of civil actions—"qualified civil liability actions"—and bars such actions from being brought

---

[15] The Ninth Circuit had held that the statute was unconstitutional under *Klein*, which it interpreted as prohibiting Congress from directing "a particular decision in a case, without repealing or amending the law underlying the litigation[.]" *Seattle Audubon Soc. v. Robertson*, 914 F.2d 1311, 1315 (9th Cir. 1990).

in any state or federal court and also requires the immediate dismissal of any such actions that are currently pending in any state or federal court. The PLCAA merely requires courts to apply a new legal standard; nothing within the statute controls a court's determination as to whether particular cases satisfy that new legal standard or its exceptions. *See City of New York, 401 F. Supp. 2d at 293 (addressing the same issue presented in this case and finding that the PLCAA does not run afoul of the Klein principle). Like the statute at issue in Robertson, the PLCAA "simply imposes the consequences of the court's application of the new legal standard." See Robertson, 503 U.S. at 349.*

2. Due Process and Takings Challenges

Plaintiffs argue that the PLCAA, by requiring immediate dismissal of this case, deprives Plaintiffs of their vested property right in their causes of action without providing due process of law or just compensation, in violation of the Fifth Amendment. According to Plaintiffs, once they filed their complaints under the Strict Liability Act, their causes of action became vested property rights and entitled to protection under the Due Process and Takings Clauses. Plaintiffs' due process and takings arguments hinge primarily on whether their causes of action may be considered a vested property right.

a. Vested Property Rights

The Court's first task in considering Plaintiffs' due process and takings challenges is to determine whether the PLCAA has deprived Plaintiffs of a property interest protected by the U.S. Constitution. *See* U.S. Const. Amend. V ("No

person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."); *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999) ("The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest[.]"); *Lynce v. Mathis*, 519 U.S. 433, 439-40 n.12 ("The Fifth Amendment's Takings Clause prevents the Legislature . . . from depriving private persons of vested property rights except for a 'public use' and upon payment of 'just compensation.'"). In this case, the Court must determine whether Plaintiffs' causes of action under the Strict Liability Act are vested property rights protected by the Fifth Amendment.

As an initial matter, the parties differ as to the source of law the Court must consult to determine whether a cause of action constitutes a vested property interest protected by the Fifth Amendment. Plaintiffs argue that the Court must consult District law to determine whether Plaintiffs' claims under the Strict Liability Act are vested property interests. In contrast, Defendants argue that the Court must consult federal constitutional law to make such a determination.

Property interests protected by the Constitution "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Town of Castle Rock v. Gonzales*, 545 U.S. _, 125 S. Ct. 2796, 2803 (2005) (quoting *Paul v. Davis*, 424 U.S. 693, 709 (1976)) (internal

quotations omitted). "Although the underlying substantive interest is created by an independent source such as state law, *federal constitutional law* determines whether that interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause." *Id.* at 2803-04 (quoting *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978)) (emphasis in original, internal quotations omitted). Accordingly, although District law creates a cause of action under the Strict Liability Act, federal constitutional law determines whether that cause of action is a property interest protected by the Constitution.[16]

Certain attributes of property interests created by statute and protected by the Due Process Clause emerge from the Supreme Court's entitlement analysis in the area of procedural due process. See *Bd. of Regents v. Roth*, 408 U.S. 564 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970). In *Roth*, the Supreme Court set the modern standard for determining whether benefits conferred by the State are property interests protected under due process: "To have a property interest in a benefit, a person clearly must have more than an abstract need . . . desire . . . [or] unilateral expectation of it. . . . [h]e must, instead, have a legitimate claim of entitlement to it." Id. at 577. It would seem that claimants cannot be said to have a legitimate claim of entitlement to their cause of action. "[A] person has no property, no vested

---

[16] Accordingly, the decision in *Barrick v. District of Columbia*, 173 A.2d 372 (D.C. 1961), *aff'd sub nom. Swenson v. Barrick*, 302 F.2d 927 (D.C. Cir. 1962), is not controlling in this case.

interest, in any rule of the common law." *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 88 n.32 (1978) (citations and internal quotations omitted); *see also New York Central R.R. Co. v. White*, 243 U.S. 188, 198 (1917) ("No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit."). "The Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object, despite the fact that otherwise settled expectations may be upset thereby." *Id.* (citation and internal quotations omitted).

The Supreme Court has held that "a cause of action is a *species* of property protected by the . . . Due Process Clause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) (emphasis added). In *Logan*, a probationary employee was discharged by his employer, purportedly because his short left leg made it impossible for him to perform his job. *Id.* at 426. Five days later, the employee filed a charge with the Illinois Fair Employment Practices Commission under the Illinois Fair Employment Practices Act ("FEPA") alleging that his employment had been unlawfully terminated because of his physical handicap. *Id.* The employee's filing triggered the Commission's statutory obligation to convene a factfinding conference to obtain evidence within 120 days. *Id.* Under the FEPA, if the Commission found "substantial evidence" of illegal conduct, it was to attempt to eliminate such conduct by means of conference and conciliation, as well as other procedures. *Id.* at 424-25. If "substantial evidence" of discrimination was not found, the Commission would

dismiss the charge. *Id.* at 425. Through inadvertence, the Commission scheduled the conference for a date five days after the expiration of the statutory period. *Id.* As a result, the employee's claim was terminated for failure to comply with the statutory timeline. *Id.* at 427. Before the Supreme Court, the employee argued that his procedural due process rights would be violated were the Commission's error allowed to extinguish his claim. *Id.* at 427-28.

Before determining what process was due, the Court had to determine whether the employee was deprived of an interest protected by the Constitution. *Id.* at 428. The Court emphasized that the "[t]he hallmark of property . . . is an individual entitlement grounded in state law, which cannot be removed except 'for cause.'" *Id.* at 430 (citing *Memphis Light*, 436 U.S. at 11-12). The Court concluded that the employee had "more than an abstract desire or interest in redressing his grievance: his right to redress is guaranteed by the State, with the adequacy of his claim assessed under what is, in essence, a 'for cause' standard, based upon the substantiality of the evidence." *Id.* at 431. Therefore, the Court concluded that the employee's right to use the FEPA's adjudicatory procedures was a protected property interest under the Due Process Clause. *Id.* at 432-33.

The Court's decision in *Logan*, however, was premised on the right, guaranteed by the State, to use the FEPA's adjudicatory procedures to redress potentially discriminatory practices, which the Court found to possess the hallmark characteristic of property: "an individual entitlement grounded in

state law, which cannot be removed except 'for cause.'" *Id.* at 430. A typical tort cause of action, whether based in statute or in the common law, does not provide a claimant with such an entitlement. "It is inchoate and affords no definite or enforceable property right until reduced to final judgment." *In re Consolidated United States Atmospheric Testing Litigation v. Livermore Labs*, 820 F.2d 982, 989 (9th Cir. 1987), *cert. denied, Konizeski v. Livermore Labs*, 485 U.S. 905 (1988). "Instead, it represents a right to assert a claim for compensation or some other form of judicial relief. . . . [and its] value is contingent on successful prosecution to judgment." *Id.* For this reason, the majority of federal courts have concluded that a cause of action is not a vested property right protected by the Fifth Amendment until it has been reduced to final judgment. *See Fields v. Legacy Health Sys.*, 413 F.3d 943, 956 (9th Cir. 2005) (holding that although causes of action are a species of property protected by the Due Process Clause, "a party's property right in any cause of action does not vest until final *unreviewable* judgment is obtained.") (quoting *Lyon v. Agusta S.P.A.*, 252 F.3d 1078, 1086 (9th Cir. 2001)) (emphasis in original and internal quotations omitted); *Jones Truck Lines v. Whittier Wood Prods. Co.*, 57 F.3d 642, 651 (8th Cir. 1995) ("Causes of action are also not fully vested interests until reduced to final judgment."); *Salmon v. Schwarz*, 948 F.2d 1131, 1143 (10th Cir. 1991) (holding that a legal tort claim "affords no definite or enforceable property right until reduced to final judgment.") (citations and internal quotations omitted); *In re TMI*, 89 F.3d 1106, 1113 (3d Cir. 1996) ("[L]egislation affecting a pending tort claim is not subject to 'heightened scrutiny' due process review because a pending tort claim does not

constitute a vested right."); *Cooperativa de Ahorro y Credito Aguada v. Kidder, Peabody & Co.*, 993 F.2d 269, 273 (1st Cir. 1993) ("It is well established that a party's property right in a cause of action does not vest 'until a final, unreviewable judgment has been obtained.'") (citation omitted); *Sowell v. American Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir. 1989) ("[A] legal claim affords no definite or enforceable property right until reduced to final judgment."); *Arbour v. Jenkins*, 903 F.2d 416, 420 (6th Cir. 1990) ("The fact that the statute is retroactive does not make it unconstitutional [because] a legal claim affords no definite or enforceable property right until reduced to final judgment.") (citation and internal quotations omitted); *Adams v. Bowsher*, 946 F. Supp. 37, 41 (D.D.C. 1996) (holding that "a cause of action, while a 'species of property' protected by due process, nonetheless is 'inchoate, and affords no definite or enforceable property right until reduced to final judgment.'") (citation omitted); *Hyundai Merchant Marine Co. v. United States*, 888 F. Supp. 543, 551 (S.D.N.Y. 1995) ("A cause of action . . . 'is inchoate and affords no definite or enforceable property right until reduced to final judgment.'") (citation omitted).

In *Hammond v. United States*, 786 F.2d 8 (1st Cir. 1986), the plaintiff, individually and as executrix of the estate of her deceased husband, brought an action against a private contractor for injuries resulting from the company's alleged failure to adequately design tests to protect the deceased from radiation exposure. *Hammond*, 786 F.2d at 9-10. Two of the plaintiff's causes of action were based in common-law negligence, and the other cause of action was brought under the Massachusetts wrongful death statute. *Id.* at 10. While the

plaintiff's action was pending, Congress enacted 42 U.S.C. § 1222, which requires the United States to be substituted as defendant in all suits against private contractors to the government for radiation injuries arising from any of the United States atomic weapons testing programs, and also makes the Federal Tort Claims Act the sole remedy for those injuries. *Id.* at 9-10. The plaintiff claimed that, by retroactively abolishing her causes of action against the private contractor, § 2212 deprived her of a property right that vested upon her filing of suit on an accrued commonlaw and state statutory cause of action, in violation of due process. *Id.* at 11.

The court began by noting that "[n]o person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit." *Id.* at 12 (quoting *New York Central*, 243 U.S. at 198); *see also Duke Power*, 438 U.S. at 88 n.32 ("[A] person has no property, no vested interest, in any rule of the common law."). That is true "after suit has been filed and continues to be true until a final, unreviewable judgment is obtained." *Id.* As such, the court held that "rights in tort do not vest until there is a final, unreviewable judgment." *Id.* Accordingly, the court held that because the plaintiff had no vested property right in her state statutory cause of action, § 2212 did not violate due process by retroactively abolishing that cause of action. *Id.*

In *Austin v. City of Bisbee*, 855 F.2d 1429 (9th Cir. 1988), the plaintiffs, police officers for the City of Bisbee, brought an action against the city under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, for unpaid overtime compensation. *Austin*, 855 F.2d at 1431. During the pendency of the

plaintiffs' action, however, Congress passed amendments to the FLSA that, retroactively, abolished the plaintiffs' causes of action against the city by shielding the city from liability for unpaid overtime during the time for which the plaintiffs claimed compensation. *Id.* The plaintiffs claimed that the amendments to the FLSA, which abolished the plaintiffs' causes of action, were unconstitutional under the Due Process Clause. *Id.* at 1432.

The court noted that its decision hinged on Congress' authority to "step into previously-filed litigation and terminate a party's substantive rights." *Id.* at 1434 (citation and internal quotations omitted). The court agreed that "a cause of action is a 'species of property protected by the Fourteenth Amendment's Due Process Clause.'" *Id.* at 1435 (citing *In re Consolidated*, 820 F.2d at 988). The court held, however, that a cause of action "is inchoate and affords no definite or enforceable property right until reduced to final judgment." *Id.* at 1436 (citation omitted). Accordingly, because the plaintiffs' causes of action had not been reduced to final judgment prior to the amendments to the FLSA, the court held that the plaintiffs had no vested property right in their causes of action that would implicate due process. *Id.*

The Court agrees with the overwhelming weight of authority in the federal courts, and holds that a cause of action is not a vested property right until reduced to a final, unreviewable judgment. Accordingly, a cause of action brought under the Strict Liability Act is not a vested property right protected by the Fifth Amendment.

b. Procedural Due Process

Plaintiffs argue that by directing the dismissal of pending lawsuits without consideration of the underlying merits, the PLCAA violates procedural due process. Procedural due process requirements "apply only to the deprivation of interests encompassed by the [Due Process Clause's] protection of liberty and property." *Roth*, 408 U.S. at 569; *accord*, *Leonard v. District of Columbia*, 794 A.2d 618, 624 (D.C. 2002). The Court, *infra*, has already determined that Plaintiffs' causes of actions under the Strict Liability Act are not vested property interests protected by the Due Process Clause. Accordingly, procedural due process protections do not apply in this case. Even if the Court had found Plaintiffs' causes of action to be property rights protected by the Fifth Amendment, the PLCAA provides all the process that is due. The PLCAA requires only that cases that fit within the Act's definition of a "qualified civil liability action" be dismissed. Before such dismissal, Plaintiffs have been given ample opportunity to demonstrate that this case falls within an exception to the definition of a "qualified civil liability action" or, in the alternative, that the Act is unconstitutional.

c. Retroactivity

The law is well-settled that "legislative Acts adjusting the burdens and benefits of economic life come to [a court] with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976); *see, e.g.*, *Ferguson v. Skrupa*,

372 U.S. 726 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-88 (1955). "[T]he strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively." *Pension Ben. Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). If the retroactive legislation is supported by a legitimate legislative purpose furthered by rational means, then "judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches[.]" *Id.* (citing *Usery*, 428 U.S. at 15-16). Although retroactive legislation does have to meet a burden not faced by legislation that has only future effects, "that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *Id.* at 730.

3. Equal Protection

The PLCAA does not affect a suspect class or a fundamental right; therefore, the Court must review the statute under the deferential rational basis standard of review. *See FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313-14 (1993). Under that standard of review, the legislation must be "rationally related to a legitimate governmental purpose." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985). The legislation must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Beach Communications*, 508 U.S. at 313. "Where there are 'plausible reasons' for Congress' action, 'our inquiry is at an end.'" *Id.* at 313-14 (quoting *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980)). No matter how unwise the legislation, "equal protection is not a

license for courts to judge the wisdom, fairness, or logic of legislative choices." *Id.* at 313. The Constitution presumes that such unwise legislation "will eventually be rectified by the democratic process." *Vance v. Bradley*, 440 U.S. 93, 97 (1979).

The Court agrees with the courts in *Ileto* and *City of New York* in holding that the PLCAA is rationally related to a legitimate governmental purpose. *See Ileto*, 2006 U.S. Dist. LEXIS at *74-77 ("Preventing undue burdens on interstate commerce is a legitimate purpose, as is protecting the firearms industry from financial ruin."); *City of New York*, 401 F. Supp. 2d at 294-95 ("There is a rational basis for the distinction the Act draws. Congress made it clear that it thought that nationwide commerce in firearms was particularly imperiled by the threat of qualified civil liability actions."). First, the PLCAA serves a legitimate governmental purpose. The legislation attempts to prevent an undue burden on interstate commerce by prohibiting certain suits that Congress found threatened the economic stability of the firearms industry. Specifically, Congress concluded that lawsuits seeking to hold the firearms industry liable for the criminal or unlawful acts of others threatened the economic viability of the industry. *See* 15 U.S.C. § 7901(b)(1). Secondly, the requirement that such lawsuits be prohibited or immediately dismissed is certainly rationally related to the PLCAA's legitimate governmental purpose of preventing an undue burden on the firearms industry.

4. Right of Access to the Courts

Plaintiffs argue that the PLCAA effectively denies Plaintiffs the ability to pursue their legal claims under the Strict Liability Act thereby restricting Plaintiffs' fundamental right of access to the courts for the redress of their grievances. This is not a case in which the government has burdened or blocked Plaintiffs' right of access to the courts to seek enforcement of the law; rather, this is a case in which Congress has altered Plaintiffs' prior rights and remedies. *See Hammond*, 786 F.2d at 13. The PLCAA enacts a new legal standard that abrogates Plaintiffs' causes of action under the Strict Liability Act. The Court agrees with the court's short treatment of this argument in *City of New York*, in which Judge Weinstein stated: "There appears to be no merit to plaintiff's claim that the Act deprives it of the right to petition by cutting off its access to the courts." *City of New York*, 401 F. Supp. 2d at 293.

IV. Conclusion

The Court finds that Plaintiffs' causes of action under the Strict Liability Act fall squarely within the PLCAA's definition of a "qualified civil liability action" and do not fall within the PLCAA's predicate exception. Furthermore, the Court finds the PLCAA to be a constitutional exercise of congressional authority. Accordingly, it is by the Court, this 22nd day of May 2006, hereby

ORDERED that Defendants' Motion for Judgment on the Pleadings is **GRANTED**.

APPENDIX D

OPINION OF THE DISTRICT OF COLUMBIA COURT OF APPEALS (APRIL 21, 2005)

DISTRICT OF COLUMBIA, Appellant,
v.
BERETTA, U.S.A., CORP., *et al.*, Appellees.

BRYANT LAWSON, *et al.*, Appellants,
v.
BERETTA, U.S.A., CORP., *et al.*, Appellees.

Nos. 03-CV-24 & 03-CV-38

Appeals from the Superior Court of the
District of Columbia
No. CA-0428-00

(Honorable Cheryl M. Long, Trial Judge)

Argued En Banc January 11, 2005.
Decided April 21, 2005.

Opinion for the court by Associate Judge FARRELL.

FARRELL, Associate Judge:

The District of Columbia and nine individual plaintiffs appeal from the dismissal of their suit against manufacturers or distributors of firearms alleging common-law negligence and public nuisance, as well as strict liability under D.C.Code § 7-2551.02 (2001). The trial court entered judgment on the pleadings for the defendants on all counts, ruling in substance that the counts of negligence and public

nuisance failed basic tests of duty, foreseeability, and remoteness as pleaded; that the District of Columbia could not bring an action under § 7-2551.02; and that, as to the individual plaintiffs, the statutory tort was insufficiently pleaded and, in any event, is an unconstitutional exercise of extra-territorial regulation by the Council of the District of Columbia.

We reverse the dismissal of the statutory count as to the individual plaintiffs, holding that they may advance to discovery on strict liability notwithstanding the difficulties of proof they may confront. We also reverse the dismissal of that count as to the District of Columbia to the extent-but only the extent-that it seeks subrogated damages as to named individual plaintiffs for whom it has incurred medical expenses. Otherwise we sustain the judgment of the trial court, holding that none of the plaintiffs has stated a valid claim of common-law negligence and that the District has not stated a claim of public nuisance on the facts alleged.[1]

I. Background

This is the second time in the District of Columbia that an actionable link has been attempted to be drawn between the manufacture or distribution of firearms and the criminal use of those weapons to kill or injure. *See Delahanty v. Hinckley,* 564 A.2d 758 (D.C.1989) (on certified question from federal court, finding no common law basis on facts alleged for holding handgun manufacturers and their officers

---

[1] The present opinion by the court en banc supersedes the opinion issued by a division of the court, published at 847 A.2d 1127 (D.C.2004).

liable under D.C. law for criminal use of gun by John W. Hinckley, Jr.). The plaintiffs in the present case are the District of Columbia government and nine individual persons who themselves were wounded or represent decedents shot and killed by persons unlawfully using firearms in the District of Columbia.[2] The defendants are numerous manufacturers, importers, or distributors of firearms. Underlying all three counts of the complaint are allegations that may be summarized as follows: Although the District of Columbia itself has stringent gun control laws, there nonetheless exists an unchecked illegal flow of firearms into the District to which the defendants by action and inaction have contributed. This flow of guns takes place in numerous ways, including "straw purchases" (purchases from licensed dealers on behalf of other persons not qualified to buy under applicable law), multiple sales (multiple purchases over a short stretch of time by persons intending to sell or transfer to others not qualified to buy), sales by the defendants to "kitchen table" dealers licensed to sell but who do not do so from retail stores, and gun show sales by sellers who typically lack federal firearm licenses and are not required to do purchaser background checks.

---

[2] To illustrate, the complaint alleges that plaintiff Bryant Lawson was shot by a semi-automatic firearm in early 1997 as he tried to flee from three armed men, all of whom were subsequently convicted of aggravated assault or related crimes arising from the shooting. As a result of the shooting, Lawson is a quadriplegic and suffers other ill effects of his disabling injuries.

The complaint alleges that the defendants have distributed their firearms without adequate self-regulation or supervision in order to increase firearm sales, knowing or constructively knowing they are creating, maintaining, or supplying the unlawful flow of firearms into the District and similarly knowing those guns will be used to commit crimes such as the ones that have caused death or injury to the individual plaintiffs or persons they represent. The complaint further alleges numerous illustrative means by which the defendants are able to restrict or impede the unlawful flow of firearms into the District but have not done so. These include (to name just three) directing and encouraging their distributors and dealers to refuse to sell in circumstances where the dealer knows or should know that the buyer seeks to make a straw purchase; requiring such dealers to refuse to sell more than one handgun a month to any person not holding a federal firearms license; and requiring their distributors to sell only to "stocking dealers," *i.e.*, retailers who stock guns from retail stores, and not to "kitchen table" dealers or at gun shows.

Based on these general allegations, Count I of the complaint (Strict Liability) alleged that the defendants are liable to the District of Columbia under D.C.Code § 7-2551.02 and related statutes for health care costs, Medicaid expenses, and other costs of assistance and compensation paid by the District to or on behalf of victims of gun violence including civilians, police officers, and firefighters, and are liable to the individual plaintiffs for direct and consequential damages proximately caused by the defendants' conduct. Count II (Negligent Distribution) alleged that the defendants breached "a

duty to the District and its residents not to create an unreasonable risk of foreseeable harm from the distribution of their firearms, and to take reasonable steps to limit this risk once it had been created." In Count III (Public Nuisance) the District alone alleged that the defendants have "created an ongoing public nuisance of readily available handguns and machine guns that unreasonably interferes with District residents' enjoyment of health, safety, and peace."

II. Standard of Review

The defendants moved for judgment on the pleadings as to all counts, Super. Ct. Civ. R. 12(c), and the trial court granted the motion and dismissed each count for failure to state a claim for which relief can be granted. Rule 12(b)(6); *see Osei-Kuffnor v. Argana*, 618 A.2d 712, 713 (D.C.1993) (standards same for dismissal under Rule 12(b)(6) and judgment under Rule 12(c)). In reviewing that decision, this court "conducts a *de novo* review of the record, construing all facts and inferences in the light most favorable to the plaintiff[s] and taking the complaint's allegations as true." *Duncan v. Children's Nat'l Med. Ctr.*, 702 A.2d 207, 210 (D.C.1997). A complaint may not be dismissed because the court merely "doubts that [the] plaintiff[s] will prevail on a claim,"*id.*(citation omitted), but "dismissal for failure to state a claim may properly be granted where it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [the] claim which would entitle [them] to relief." *Id.* (citation and quotation marks omitted).

Applying these standards, we consider first the two common-law counts alleged, then the statutory

count as it relates to each of the two classes of plaintiffs.

III. Negligent Distribution

The trial court dismissed the count of negligent distribution primarily on the basis of *Delahanty, supra.* That decision, unless overruled, indeed appears to bar the plaintiffs' attempt to plead negligence for harm resulting from the unlawful actions of third parties. *Delahanty* came before a division of the court as a certified question from the United States Court of Appeals asking "whether, in the District of Columbia, 'manufacturers and distributors of Saturday Night Specials may be strictly liable for injuries arising from these guns' criminal use." ' *Delahanty,* 564 A.2d at 759 (citation omitted). The panel's answer to that question ranged more widely, however. It pointed out that, although "[t]he certifying court focused on whether this court would adopt the strict liability theory described in *Kelley* [*v. R.G. Indus.,* 304 Md. 124, 497 A.2d 1143 (Md.1985)]," that court noted that " 'the theoretical underpinnings [of *Kelley*] are somewhat unclear' and that the certified question was not intended to restrict this court to a particular rationale for this cause of action." *Delahanty,* 564 A.2d at 760 (citation omitted). Further, because this court is "not limited to the designated question of law [in any event] but may 'exercise our prerogative to frame the basic issues as we see fit for an informed decision," ' and because the *Delahanty* appellants were not relying "exclusively on the *Kelley* theory but have continued to advance in this court all the theories in their complaint," we "expand[ed] our inquiry to include the question whether established theories of tort law in the District of Columbia provide a cause of action

against gun manufacturers and distributors for injuries arising from the guns' criminal uses." *Id.* (citation omitted).

Just as the federal District Court had dismissed the entire complaint for failure to state a claim, this court "reject[ed] each of the theories appellants have advanced in the federal courts and in this court." *Id.* We rejected first their theory of strict liability for sale of a defective product, based not on a claim of defective design or manufacture-no such claim was advanced-but on the assertion "that the manufacturers had a duty to warn of the dangers of criminal misuse of the gun." There is no duty to warn, we answered, when a potential danger is known and recognized, and "[b]ecause hazards of firearms are obvious, the manufacturer had no duty to warn." *Id.* (citing *inter alia* RESTATEMENT (SECOND) OF TORTS § 402A cmt. j). We paused only slightly longer over the appellants' attempt to apply the theory of "abnormally dangerous activity," *see* RESTATEMENT §§ 519, 520, to the marketing of handguns. That cause of action, we explained,

> applies only to activities that are dangerous in themselves and to injuries that result directly from the dangerous activity. The marketing of a handgun is not dangerous in and of itself, and when injury occurs, it is not the direct result of the sale itself, but rather ... of actions taken by a third party.

Delahanty, 564 A.2d at 761 (citation and quotation marks omitted). We again emphasized that "any likelihood that ... harm will be great ... would result from the use, not the marketing as such, of

handguns." *Id.* And we rejected for similar reasons the "social utility" theory of tort adopted by the Maryland courts in *Kelley, supra*-"requiring proof that the danger of the product outweighs its social utility and that no legislative imprimatur be associated with the product to the contrary,"*id.*-pointing out, among other things, that the appellants' attempt to make actionable the manufacture or distribution of "a certain class of inexpensive and allegedly unreliable handguns" (*i.e.*, Saturday Night Specials) ignored the fact that "[a]ll firearms are capable of being used for criminal activity." *Id.* at 761-62 (citation and internal quotation marks omitted).

Finally, we rejected the cause of action for negligent manufacture or distribution, explaining:

> "In general no liability exists in tort for harm resulting from the criminal acts of third parties, although liability for such harm sometimes may be imposed on the basis of some special relationship between the parties." *Hall v. Ford Enters., Ltd.*, 445 A.2d 610, 611 (D.C.1982); *see also Kline v. 1500 Massachusetts Ave. Apartment Corp.*, 141 U.S.App. D.C. 370, 375-76, 439 F.2d 477, 482-83 (1970) (relationships giving rise to a duty of protection include landlord to tenant, school district to student, employer to employee, and hospital to patient); *District of Columbia v. Doe*, 524 A.2d 30, 32 (D.C.1987) (school to student). We are not inclined to extend the rationale of these decisions to the present case. Appellants have alleged no special

> relationship with the gun manufacturers and have suggested no reasonable way that gun manufacturers could screen the purchasers of their guns to prevent criminal misuse.

Delahanty, 564 A.2d at 762.

Although our rejection of liability in *Delahanty* rested throughout on the absence of a direct link between the manufacture or distribution of handguns and injuries caused by the criminal misuse of those weapons, it is especially the refusal "to extend the rationale of [our] decisions" to the negligence theory alleged there that the plaintiffs must confront in asserting their claim of negligent distribution here. They first argue that the negligence discussion in *Delahanty* was *dictum* given the precise phrasing of the D.C. Circuit's question. The fact, however, that we "expand[ed] our inquiry"-as the certifying court foresaw we might-to render "an informed decision" on the reach of "established theories of tort law in the District of Columbia,"*id.* at 760, does not make our analysis of any of those theories advisory. That reasoning would make an entire subset of answers to certified questions-*i.e.*, those in which we exercise the "latitude" given us to "consider[ ] nondesignated questions and [to] reformulat[e], if necessary, ... [the] questions as certified," *Penn Mut. Life Ins. Co. v. Abramson*, 530 A.2d 1202, 1207 (D.C.1987)-non-binding *dicta*, contrary to our law that such answers are "*stare decisis* of this court." *Id.*

At bottom, the plaintiffs argue that *Delahanty* was wrongly decided, because, contrary to its

holding, District of Columbia law requires no "special relationship between the parties" (such as that of landlord and tenant) to permit liability in negligence for criminal acts of others, so long as the defendant realized or should have realized the likelihood that his negligent conduct would cause foreseeable harm to the plaintiffs. Sitting en banc, we decline this invitation to overrule *Delahanty*. And we pass over the question whether a "special relationship" between a plaintiff and a defendant must undergird any claim of negligence in the District based on harm stemming directly from the criminal acts of third persons. *But see Workman v. United Methodist Comm.*, 355 U.S.App. D.C. 131, 135, 320 F.3d 259, 263 (2003) (surveying this court's decisions and concluding that under them "the requirement that the defendant [has] been able to foresee that a third party would likely commit a criminal act ordinarily has, and perhaps must have, a relational component"). We nevertheless conclude that our decisions addressing general tort concepts of duty and foreseeability do not permit recognition of a claim for common-law negligence on the facts alleged here.

Where an injury is caused by the intervening criminal act of a third party,

> this court has repeatedly held that liability depends upon a more heightened showing of foreseeability than would be required if the act were merely negligent. In such a case, the plaintiff bears the burden of establishing that the criminal act *was so foreseeable that a duty arises to guard against it.* Because of the extraordinary

> nature of criminal conduct, the law requires that the foreseeability of the risk be more precisely shown.

Potts v. District of Columbia, 697 A.2d 1249, 1252 (D.C.1997) (citations and internal quotation marks omitted; emphasis added). In this context, then, the requisite duty of care required for negligence[3] is a function of foreseeability, arising only when foreseeability is alleged commensurate with "the extraordinary nature of [intervening] criminal conduct." *Id.*[4] And, as we further stated in *Potts*,"[o]ur opinions have made clear *the demanding nature of the requirement of 'precise' proof of a 'heightened showing of foreseeability'* in the context of an intervening criminal act involving the discharge

---

[3] "[T]o establish negligence a plaintiff must prove a duty of care owed by the defendant to the plaintiff, a breach of that duty by the defendant, and damage to the interests of the plaintiff, proximately caused by the breach." *District of Columbia v. Harris*, 770 A.2d 82, 87 (D.C.2001) (citations and internal quotation marks omitted).

[4] In *Workman*, the D.C. Circuit noted the theoretically somewhat anomalous blending of duty and foreseeability in this court's decisions ("Ordinarily, the relationship between the parties is the key to determining whether the defendant had a legally enforceable duty to the plaintiff (or her decedent), whereas foreseeability is important to issues of proximate causation and conformity to the standard of care, issues that arise only after a duty has been found."), but that nevertheless "the D.C. courts have repeatedly spoken of the heightened foreseeability requirement in terms of duty." 355 U.S.App. D.C. at 137, 320 F.3d at 265. We see no need to reconsider that framework of analysis in this case.

of weapons." *Id.* (citations omitted; emphasis added). The high-water mark, as it were, of a showing of facts sufficient to create a duty to protect against such conduct was in *District of Columbia v. Doe,* 524 A.2d 30 (D.C.1987), where the claim was that reasonable protective measures by the District of Columbia could have prevented a child from being raped at a District elementary school. Acknowledging the requirement of a heightened showing of foreseeability in that context, *id.* at 33, we nonetheless identified evidence specific to that school and surrounding area that "could be viewed by reasonable factfinders as enhancing the foreseeability of danger from intruders, thereby creating a duty on the part of District officials to protect the students from this type of criminal activity." *Id.* at 34.[5] In three succeeding cases, by contrast, we rejected liability as a matter of law where foreseeability (hence duty) was not limited by any evidentiary reference to a precise location or class of persons.

In *Clement v. Peoples Drug Store,* 634 A.2d 425 (D.C.1993), in which an employer was sued for negligence arising from the shooting death of one of its employees in the store parking lot, "the only

---

[5] In particular, there was evidence that "crimes against persons [had been committed] in and around the school ... [including] a robbery on the school's playground; sexual assaults and other violent activity [had occurred] in the surrounding area"; and the school security system was defective due to an open rear gate, doors that would not lock, and a malfunctioning intercom, permitting "adult males [to] freely roam [ ] throughout the school." *Doe,* 524 A.2d at 34.

evidence presented with respect to [the] shooting's foreseeability was an expert's opinion based on police reports of criminal activity in the surrounding area. No evidence was introduced involv[ing] any gun-related incidents at the particular shopping mall in which the shooting occurred." *Potts*, 697 A.2d at 1252 (summarizing basis for *Clement* 's holding). In *Bailey v. District of Columbia*, 668 A.2d 817 (D.C.1995), where the plaintiff was shot after attending a cheerleading competition at a junior high school as she was leaving the building, she offered the affidavit of witnesses who asserted that the neighborhood around the school was a "high drug area" and that shootings and other criminal acts had taken place there. Rejecting this showing as insufficient, we explained that "[a]lthough the occurrence of shootings in, and in the vicinity of, the District's public schools is an unhappy reality, ... such 'generic information,' by itself, does not create a duty on the part of the District to protect against the use of firearms under the circumstances presented here." *Id.* at 820.[6] Finally, in *Potts, supra*, the plaintiffs were injured by gunshots from an unknown source as they were leaving the Washington Convention Center (WCC) after attending a boxing event organized by Spencer Promotions, Inc. They sued the organizer and (among others) the District of Columbia for negligence. Relying principally on *Bailey* and *Clement*, we sustained a grant of summary judgment because "plaintiffs [had]

---

[6] In particular, "there was no evidence of prior gun-related violence or assaults occurring at the school or [even] at any of the many cheerleading competitions that had been held anywhere in the city." *Bailey*, 668 A.2d at 821.

proffered no evidence of any prior gun-related violence at any other event held at the WCC or promoted by Spencer Promotions, nor any other specific evidence bearing directly on the foreseeability of the shooting incident at issue here." 697 A.2d at 1252.

Potts, *Bailey*, and *Clement* were decided on summary judgment rather than a motion to dismiss, but they demonstrate the tight boundaries-requiring " 'precise' proof of a 'heightened showing of foreseeability,' " *Potts*, 697 A.2d at 1252-within which a claim of common-law negligence must be framed in this jurisdiction "in the context of an intervening criminal act involving the discharge of weapons." *Id.* The plaintiffs in this case broadly allege a duty and foreseeable harm to "the District [of Columbia] and its residents." Complaint, ¶ 151. That duty is unlike even the one claimed to be owed subclasses of residents (shoppers at a particular store, children at a given school, attendees of a particular event) regarding whom we have repeatedly said that "generic" proffers of foreseeability do not suffice to create a duty of care. The class to whom the defendants allegedly owed a duty here is potentially unlimited except by the population of the District of Columbia, any member of which could be a shooting victim. That indeterminacy, as other courts have recognized, results from the sheer number of ways in which firearms, despite any reasonable precautions manufacturers can be expected to take, may reach the hands of criminal wrongdoers-the sheer number of causal links, in other words, between the licensed manufacture and distribution of firearms and their use to kill or injure others. This court's decisions, we conclude, do not permit recognition of a common-law tort resting on such limitless notions of duty and

foreseeability. *See also Lacy v. District of Columbia*, 424 A.2d 317, 320-21 (D.C.1980) (citation and internal quotation marks omitted) (recognizing, as a matter of "policy," the existence in our law of "various liability-limiting considerations which relieve the defendant of liability for harm he actually caused where the chain of events appears highly extraordinary in retrospect").[7]

Among courts rejecting claims of negligent distribution of firearms similar to the plaintiffs', the New York Court of Appeals in *Hamilton v. Beretta, U.S.A., Corp.*, 96 N.Y.2d 222, 727 N.Y.S.2d 7, 750 N.E.2d 1055 (2001), *leave to appeal denied*, 100 N.Y.2d 514, 769 N.Y.S.2d 200, 801 N.E.2d 421 (2003), has provided the most cogent analysis. Like our *Delahanty* decision, *Hamilton* answered certified questions of law from the federal Circuit Court, including whether under New York decisional law, "the defendants owed plaintiffs a duty to exercise

---

[7] *District of Columbia v. Carlson*, 793 A.2d 1285 (D.C.2002), does not help the plaintiffs. It concerned the District's duty to maintain in working condition traffic signals installed at intersections with pedestrian crosswalks. The main issue was whether the District could reasonably foresee "that a negligent driver might strike a pedestrian crossing the street" when the traffic light was not working. *Id.* at 1290. Unsurprisingly, the court held that it could, even though the driver technically had "violated a criminal statute" by failing to yield the right of way. *Id.* But we took pains to add that the driver's negligence "was not an intentional act," *id.* at 1291, reflecting our awareness of how very different "the intervening act of another" was in *Carlson*, *id.* at 1290, from the unforeseeable criminal actions of third parties in *Potts*, *Bailey*, and *Clement*.

reasonable care in the marketing and distribution of the handguns they manufacture." *Id.* at 1059. The federal District Court had "imposed a duty on gun manufacturers 'to take reasonable steps available at the point of ... sale to primary distributors to reduce the possibility that these instruments will fall into the hands of those likely to misuse them.' " *Id.* at 1061 (citation omitted). The New York Court of Appeals rejected that duty as a basis for common-law negligence. Its prior decisions, like this court's, were "cautious ... in extending liability to defendants for their failure to control the conduct of others," a "judicial resistance to the expansion of duty [growing] out of practical concerns both about potentially limitless liability and about the unfairness of imposing liability for the acts of another." *Id.* at 1061. Under the duty imposed by the District Court, by contrast, "[t]he pool of possible plaintiffs is very large-potentially, any of the thousands of victims of gun violence." *Id.* (footnote omitted). Moreover, the court reasoned,

> the connection between defendants, the criminal wrongdoers and plaintiffs is remote, running through several links in a chain consisting of at least the manufacturer, the federally licensed distributor or wholesaler, and the first retailer. The chain most often includes numerous subsequent legal purchasers or even a thief. Such broad liability, potentially encompassing all gunshot crime victims, should not be imposed without a more tangible showing that defendants were a direct link in the causal chain that resulted in plaintiffs' injuries, and that

> defendants were realistically in a position to prevent the wrongs.

Id. at 1061-62.

The court therefore rejected the plaintiffs' assertion of "a general duty of care aris[ing] out of the gun manufacturers' ability to reduce the risk of illegal gun trafficking through control of the marketing and distribution of their products," pointing out that to "impos[e] such a general duty of care would create not only an indeterminate class of plaintiffs but also an indeterminate class of defendants whose liability might have little relationship to the [social] benefits of controlling illegal guns." *Id.* at 1063.[8] Although the plaintiffs had "presented [the court] with a novel theory-negligent marketing of a potentially lethal yet legal product, based upon the acts not of one manufacturer, but of an industry-we are unconvinced," the court concluded, that "on the record before us[ ] the duty plaintiffs wish to impose is either reasonable or circumscribed." *Id.* at 1068.

The plaintiffs here point out that *Hamilton* was not decided on a motion to dismiss but only after a trial had shown the absence of proof "that the gun used to harm [the injured plaintiff] came from a source amenable to the exercise of any duty of care

---

[8] Another way of viewing it, the court said, was that no evidence had been offered "tending to show to what degree [the plaintiffs'] risk of injury was enhanced by the presence of negligently marketed and distributed guns, as opposed to the risk presented by all guns in society." *Hamilton*, 727 N.Y.S.2d 7, 750 N.E.2d at 1062.

that plaintiffs would impose upon defendant manufacturers." *Id.* at 1062. But the plaintiffs in our case do not claim that through discovery they may be able "tangibl[y]" to show "that defendants were a *direct* link in the causal chain that resulted in plaintiffs' injuries,"*id.*(emphasis added)-that, in the language of our cases, those injuries were foreseeable to the defendants in the "heightened" sense entailing " 'precise proof ' " of knowledge and corresponding ability to prevent required by our decisions. *Potts, supra.* At most the plaintiffs allege that the defendants in the aggregate know that a sizeable number of the firearms they manufacture make their way, through dealer practices they reasonably could limit, into the District of Columbia and into the hands of criminals, sometimes with "only a short time passing between the retail sale of a firearm outside the District and its criminal misuse in the District." Complaint, ¶ 123. Even if, as they claim, discovery may enable them to tie a particular weapon used to kill or injure a named plaintiff or his decedent to a particular manufacturer, they would still not have established a cognizable-*i.e.*, a "reasonable or circumscribed," *Hamilton, supra*-common-law duty to these plaintiffs rather than a duty to the class of all potential victims of gun violence in the District. They would not, in sum, have stated a claim under our decisions for common-law negligence based on injuries resulting from the criminal acts of third parties.

There is an additional reason why we decline to recognize the plaintiffs' claim for common-law negligence in the distribution of firearms. The Council of the District of Columbia has intervened precisely in this area by enacting a strict liability

statute governing the manufacture and sale of a subclass of firearms (assault weapons) whose lethal character, in its judgment, outweighs any social utility they may have. *See*D.C.Code § 7-2551.02. Under that statute, as we hold in part V, *infra*, the individual plaintiffs have stated a valid claim (and the District as well may have limited subrogation rights). In analogous circumstances, this court has refused to expand the boundaries of a common-law cause of action in tort. Specifically, in *Carl v. Children's Hosp.*, 702 A.2d 159 (D.C.1997) (en banc), the full court adopted the tort of wrongful discharge as an exception to the traditional at-will doctrine governing termination of employment, where the discharge violates "a clear mandate of public policy." *Id.* at 164. Although we left future applications of the tort to be decided on a case-by-case basis, we stressed that any such application must be "carefully tethered to fundamental policies" implicit in "statute[s] or municipal regulation[s], or in the Constitution." *Id.* at 164. More important for present purposes, in succeeding cases divisions of the court have declined to apply this cause of action where the policy in question was not implicit-*i.e.*, embodied in some related statute-but rather was "explicit and [might] apply directly" through a statute expressly addressing the matter. *Freas v. Archer Servs., Inc.*, 716 A.2d 998, 1002 (D.C.1998) (rejecting application of *Carl* as unnecessary where suit was based on statutorily banned and actionable retaliation for exercising rights under the Workers' Compensation Act); *see also McManus v. MCI Communications Corp.*, 748 A.2d 949, 957 (D.C.2000) (noting and applying the court's previous rejection of "the argument ... that a public policy exception to the at-will doctrine applies to an alleged statutory

violation"). That deference to the legislative role commends itself to us in this case as well. The existence of § 7-2551.02 reinforces our unwillingness to relax basic "liability-limiting" standards, *Lacy, supra,* of duty, foreseeability, and causal remoteness to recognize the cause of action for common-law negligence the plaintiffs advocate.[9]

IV. Public Nuisance

Much of what we have said so far explains why we also reject on the pleadings the claim for public nuisance brought by the District of Columbia alone. The RESTATEMENT (SECOND) OF TORTS § 821B (1) (1979) defines that tort as "an unreasonable interference with a right common to the general public." The District argues that this cause of action does not derive from its negligence claim, but is an independent cause of action with distinct elements,

---

[9] *Cf. also Williams v. Baker,* 572 A.2d 1062, 1072 (D.C.1990) (en banc), where in adopting the zone of danger test limiting the class of persons who may claim negligent infliction of emotional distress, the court explained:

> [T]his jurisdiction should not cast itself adrift on a sea of infinite foreseeability, subject only to such arbitrary limitation as we should impose.... [T]he issue of whether a plaintiff can recover damages for fear of harm to a third person is a question of policy for the court, not one to be determined on a case-by-case determination of whether the injury was foreseeable.

namely, (1) an interference with a public right (2) that is unreasonable. Although this court referred to that definition of the tort in *B & W Mgmt., Inc. v. Tasea Inv. Co.*, 451 A.2d 879 (D.C.1982), the defendants and their amici argue that we have never recognized a public nuisance claim that did not involve either ownership (and control of) real property, criminal violations, or independently tortious conduct such as negligence-none of which is alleged, or sufficiently alleged, in this case.

As an independent tort, claims of nuisance have indeed not been viewed favorably by this court. In recent cases we have even said that "nuisance is a type of damage and not a theory of recovery in and of itself," *Jonathan Woodner Co. v. Breeden*, 665 A.2d 929, 934 (D.C.1995), so that recovery in such cases, "if at all, [must be] on the theory of negligence," *Bernstein v. Fernandez*, 649 A.2d 1064, 1072 (D.C.1991) (citation and quotation marks omitted), or another theory such as intentional infliction of emotional distress. *Jonathan Woodner Co., supra.* The District argues that these statements were made in the context of claims for private, not public, nuisance but our decision in *Bernstein* noted that, "for the purpose of our holding in this case," the point did not depend on "whether the alleged nuisance is public or private." *Bernstein*, 649 A.2d at 1072 n. 8. Even the RESTATEMENT definition explains "nuisance" by "reference to two particular kinds of harm-the invasion of two kinds of interests[, public and private]-by conduct that is tortious *only if it falls into the usual categories of tort liability.*" RESTATEMENT (SECOND) OF TORTS § 821A cmt. c (1979) (emphasis added).

The defendants here do not dispute, however, that a separate tort of public nuisance is cognizable in the District of Columbia, or that the RESTATEMENT provides the appropriate definition: "an unreasonable interference with a right common to the public." We accept the case before us on that basis. The question, nevertheless, is whether the District has sufficiently pleaded that cause of action, and the answer depends critically on how prepared we are to loosen the tort from the traditional moorings of duty, proximate causation, foreseeability, and remoteness that have made us reject the plaintiffs' claim of negligence. For the following reasons, we are not convinced that the public nuisance cause of action the District alleges is sufficiently distinguishable from its negligence claim to justify a different result.

The issue was defined pointedly by the majority and dissenting opinions in *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 309 A.D.2d 91, 761 N.Y.S.2d 192,*leave to appeal denied,* 100 N.Y.2d 514, 769 N.Y.S.2d 200, 801 N.E.2d 421 (2003), where the state's suit for public nuisance essentially mirrored the District's allegations in this case:

> Plaintiff's complaint ... claims that illegally possessed handguns are a common-law public nuisance because they endanger the health and safety of a significant portion of the population; interfere with, offend, injure and otherwise cause damage to the public in the exercise of rights common to all; and that, after being placed on actual and constructive notice that guns defendants sell, distribute and market are

> being used in crimes, they have, by their conduct and omissions, created, maintained and contributed to this public nuisance, because they manufacture, distribute and market handguns allegedly in a manner that knowingly places a disproportionate number of handguns in the possession of people who use them unlawfully. Plaintiff further claims that defendants are on notice that certain types of guns, and guns sold in certain locales, are disproportionately used in the commission of crimes.

Id. at 194. The dissent in *Sturm, Ruger* took the position that "[a] negligence analysis, with its requirement of the existence of a duty limited by concomitant considerations of proximate cause, foreseeability, fault, intent, and tempered by notions of the equitable apportionment of economic liability, is inapposite to an action for abatement of a public nuisance brought by the state in the proper exercise of its police powers." *Id.* at 208 (Rosenberger, J., dissenting).

The majority rejected that proposition, in large part "based on the reasoning and implications of *Hamilton v. Beretta,* [*U. S.A., Corp., supra*]." *Sturm, Ruger,* 761 N.Y.S.2d at 194. It determined that "much of the Court [of Appeals'] reasoning in dismissing the *Hamilton* negligent marketing complaint logically, and most aptly, applies to our consideration of this plaintiff's common-law public nuisance claim." *Id.* at 196. In particular, the *Hamilton* court's concern about "potentially limitless liability and about the unfairness of imposing

liability for the acts of another" was "common to both negligent marketing and public nuisance claims," because to disregard "the existence, remoteness, nature and extent of any intervening causes between defendants' lawful commercial conduct and the alleged harm" would invite "a flood of limitless, similar theories of public nuisance, not only against these defendants, but also against a wide and varied array of other commercial and manufacturing enterprises and activities." *Id.* at 196-97. Whereas New York decisions validating public nuisance claims had "involve[d] specific harm directly attributable to defendant or defendant's activity," *id.* at 198 n. 2, the present complaint would "impose[ ] an undefined duty of care on handgun manufacturers and distributors," *id.* at 200, despite the "intervention of unlawful and frequently violent acts of criminals-over whom defendants have absolutely no control-who actually, directly, and most often intentionally, cause the cited harm." *Id.* at 199. The court concluded that the legislative and executive branches were "vastly better suited to address" the "societal problems associated with, or following, legal handgun manufacturing and marketing,""problems which may be as remote from a defendant's conduct and control as these." *Id.* at 203.

We agree with this reasoning, and are similarly unwilling to recognize a claim of common-law public nuisance that disregards, or greatly dilutes, the liability-limiting factors applied in part III, *supra*. The sheer number of causal links, and resulting attenuation, that underlie the District's claim of injury from the defendants' invasion of a public right were described by the Supreme Court of Connecticut in a similar suit brought by the city of Bridgeport:

The manufacturers sell the handguns to distributors or wholesalers and ... those sales are lawful because federal law requires that they be by licensed sellers to licensed buyers. The distributors then sell the handguns to the retailers, sales that, again, are required by federal law to be by licensed sellers to licensed buyers. The next set of links is that the retailer then sells the guns either to authorized buyers, namely, legitimate consumers, or, through the "straw man" method or other illegitimate means, to unauthorized buyers, sales that likely would be criminal under federal law. Next, the illegally acquired guns enter an "illegal market." From that market, those guns end up in the hands of unauthorized users. Next, either the authorized buyers misuse the guns by not taking proper storage precautions or other unwarned or uninstructed precautions, or the unauthorized buyers misuse the guns to commit crimes or other harmful acts. Depending on the nature of the conduct of the users of the guns, the plaintiffs then incur expenses for such municipal necessities as investigation of crime, emergency and medical services for the injured, or similar expenses. Finally, as a result of this chain of events, the plaintiffs ultimately suffer ... increased costs for various municipal services, ... injuries and deaths of Bridgeport's residents, ... and a negative impact on the ... ability of the

> residents to live free from apprehension of danger.

Ganim v. Smith & Wesson Corp., 258 Conn. 313, 780 A.2d 98, 123-24 (2001).[10] The court rejected a claim of public nuisance brought by "a plaintiff situated as remotely from the defendants' conduct as these plaintiffs are, or who present[ ] a chain of causation as lengthy and multifaceted as these plaintiffs have." *Id.* at 133.

Other courts likewise have rejected public nuisance as a basis for holding gun manufacturers and distributors liable, either because they found no duty owed to the public at large to prevent guns from ending up in the hands of criminal wrongdoers, or for reasons of attenuation, remoteness, or inability of those defendants to control the nuisance. *See generally Tioga Pub. School Dist. # 15 v. United States Gypsum Co.*, 984 F.2d 915, 920 (8th Cir.1993) ("[L]iability for damage caused by a nuisance turns on whether the defendant is in control of the instrumentality alleged to constitute a nuisance, since without control a defendant cannot abate the

---

[10] Like the Connecticut complaint, the District's public nuisance claim alleges that the "[d]efendants' ongoing conduct has created an ongoing public nuisance of readily available handguns and machines guns ... that unreasonably interferes with District residents' enjoyment of health, safety, and peace .... As a result of the continued possession and use of these firearms, residents of the District will be killed and injured, and the public will continue to fear for its health, safety, and welfare and will be subjected to conduct that creates a reasonable apprehension of danger to person and property." Complaint, ¶ 164.

nuisance."). The court in *Camden County Bd. of Chosen Freeholders v. Beretta, U.S.A., Corp.*, 273 F.3d 536 (3d Cir.2001), for example, recited "a chain of seven links" necessary to "connect the manufacture of handguns with municipal crime-fighting costs," and held that

> [t]his causal chain is simply too attenuated to attribute sufficient control to the manufacturers to make out a public nuisance claim. In the initial steps, the manufacturers produce lawful handguns and make lawful sales to federally licensed gun distributors, who in turn lawfully sell those handguns to federally licensed dealers. Further down the chain, independent third parties, over whom the manufacturers have no control, divert handguns to unauthorized owners and criminal use.

Id. at 541. The same court in *City of Philadelphia v. Beretta, U.S.A., Corp.*, 277 F.3d 415 (3d Cir.2002), rejected the city's attempt "to shorten the causal chain by arguing that the 'thriving illegal market ... injures [it], even before any guns acquired in the illegal market are actually used in the commission of a crime.' " *Id.* at 424. This assertion, the court explained, "does not reduce the links that separate a manufacturer's sale of a gun to a licensee and the gun's arrival in the illegal market through a distribution scheme that is ... lawful" and a succession of unlawful third-party acts (such as straw purchases) "likely [to be] ... long[ ] and ... varied." *Id.* (footnote omitted).

Most recently, the Supreme Court of Illinois unanimously rejected a public nuisance claim by the City of Chicago almost identical to the one made here (unlike in the present suit, the defendant-class there included retail gun dealers as well as manufacturers and distributors). *See City of Chicago v. Beretta, U.S.A. Corp.*, 213 Ill.2d 351, 290 Ill.Dec. 525, 821 N.E.2d 1099 (2004). Recognizing first that the gun manufacturers and distributors were "highly regulated by state or federal law," the court held that a claim for public nuisance could be brought against them only if, at a minimum, they had negligently conducted their business operations, which in turn presupposed that they owed a duty to the Chicago public "to exercise reasonable care to prevent their firearms from ending up in the hands of persons who use and possess them illegally in the City of Chicago." *Id.* at 1109. The court found no such "duty [of the manufacturers and distributors] owed to the public at large," explaining:

> It is reasonably foreseeable, in a nation that permits private ownership of firearms, that criminals will obtain guns and it is not only likely, but inevitable, that injuries and death will result. It is less foreseeable to these defendants that the criminal conduct of individuals who illegally take firearms into a particular community will result in the creation of a public nuisance there. Further, despite plaintiffs' suggestion that the only burden they would place on defendants is the loss of sales to criminals, the magnitude of the burden that plaintiffs seek to impose on the manufacturer and distributor defendants by altering their

> business practices is immense. Finally, plaintiffs predict only positive consequences if this duty is recognized-the city will be safer and lives will be saved. *Such positive consequences are speculative at best, being based on the assumption that criminals will not be able to obtain guns manufactured by other companies and sold by other dealers.* The negative consequence of judicially imposing a duty upon commercial enterprises to guard against the criminal misuse of their products by others *will be an unprecedented expansion of the law of public nuisance.*

Id. at 1126 (emphasis added).

Even as to the retail dealer defendants, alleged (*inter alia*) to have sold firearms regularly to Chicago buyers although "the words or behavior of the buyers indicate[d] an intention to use the weapon illegally,"*id.* at 1107, the Illinois court rejected the claim that they were the "legal cause" of the public nuisance alleged. The court pointed to "the link between the questions of the existence of a duty and the existence of legal cause" inasmuch as "[b]oth depend on an analysis of foreseeability." *Id.* at 1136. It noted that it was "not faced with the question of whether a gun dealer might be held liable for negligently entrusting a weapon to an individual buyer when it is foreseeable that the buyer might allow a third party to possess or use the gun illegally." *Id.* at 1137. Rather, the "plaintiffs argue that it is foreseeable to these defendants that the aggregate effect of numerous sales transactions

occurring over time and in different multiple locations operated by businesses with no ties to each other will result in the creation of a public nuisance in another city." *Id.* The court responded that "it is not at all clear that [this] condition would cease to exist even if these particular defendants entirely ceased selling firearms":

> The manufacture and sale of firearms is legal. There is a market for these products that is served by thousands of dealers all across the country. The sales that would otherwise have been made by these dealers would be made by others. Ultimately, there would be a shift in market share between these dealers and others and, perhaps, an increase in the price of illegal weapons "on the street" as those intent on illegal ownership had to go further afield in search of weapons to buy.

Id. As in the case of the manufacturers and distributors, the court found that "the consequences of imposing a duty upon the dealer defendants to prevent the creation of a public nuisance in the city of Chicago by those intent on illegally possessing and using guns in the city are ... far-reaching." *Id.* at 1138. It concluded:

> [T]he alleged public nuisance is not so foreseeable to the dealer defendants that their conduct can be deemed a legal cause of a nuisance *that is the result of the aggregate of the criminal acts of many individuals over whom they have no control.* This is one of those "instances in which a party may have contributed in

> some remote way [to the harm] and yet it is inappropriate to subject that party to tort liability."

Id. (quoting *Sturm, Ruger,* 761 N.Y.S.2d at 202) (emphasis added; internal quotation marks omitted).

Applied to the manufacturer and distributor defendants before us, we agree with the Illinois court's analysis. The District contends that these defendants are aware of, and in some ways even complicit in, the practices of certain "notorious" gun dealers in the counties surrounding the District of Columbia who sell firearms indiscriminately (particularly through straw sales) to persons they know or should know intend to use or possess them in the District of Columbia. But even assuming that the defendants can be said to exercise some control over the business practices of those independent dealers, the District has not alleged-any more than did the plaintiffs in *City of Chicago*-reason to believe that the exercise of that control would abate the nuisance of guns unlawfully in the hands of persons in the District to any perceptible degree. Deplorable though these facts may be, the ready availability of firearms in the nation at large, and the sheer number and variety of opportunities by which persons intent on acquiring them unlawfully can do so, counsel strong restraint on the part of a court asked to hold defendants-individual or corporate-answerable for a common-law nuisance that "result[s from] the aggregate of the criminal acts of many individuals over whom they have no control." *City of Chicago,* 290 Ill.Dec. 525, 821 N.E.2d at 1138. In keeping with our own decisions and others we have found persuasive, we decline to relax the common-

law limitations of duty, foreseeability, and direct causation so as to recognize the broad claim of public nuisance the District has alleged.

In this regard, moreover, what we stated at the end of our discussion of negligence, part III, *supra*, remains pertinent: The legislature, by enacting D.C.Code § 7-2551.02, has eased the liability-limiting elements of traditional tort law to create a cause of action against gun manufacturers and distributors for injuries to individuals caused by a particular class of lethal firearms having little or no social utility. In these circumstances, we are doubly unpersuaded of the necessity or wisdom of adopting judicially a right of action for public nuisance applied to the manufacture and sale of guns generally, where an effect may be a proliferation of lawsuits "not merely against these defendants[ ] but ... against ... other types of commercial enterprises"-manufacturers, say, of liquor, anti-depressants, SUVs, or violent video games-"in order to address a myriad of societal problems ... regardless of the distance between the 'causes' of the 'problems' and their alleged consequences." *Sturm, Ruger,* 761 N.Y.S.2d at 203.

V. Strict Liability

In Count I, the plaintiffs all have brought suit under D.C.Code § 7-2551.01 *et seq.* (2001), the Assault Weapon Manufacturing Strict Liability Act of 1990 (the "SLA" or "Act"). The operative provision of the statute, § 7-2551.02, states:

> Any manufacturer, importer, or dealer of an assault weapon or machine gun shall be held strictly liable in tort, without regard

> to fault or proof of defect, for all direct and consequential damages that arise from bodily injury or death if the bodily injury or death proximately results from the discharge of the assault weapon or machine gun in the District of Columbia.

The SLA defines "assault weapon" to include a number of specific products, and invests "machine gun" with the same meaning defined in D.C.Code § 7-2501.01(10), *i.e.*,"any firearm which shoots, is designed to shoot, or can be readily converted or restored to shoot: (A) Automatically, more than 1 shot by a single function of the trigger; [or] (B) Semiautomatically, more than 12 shots without manual reloading." In enacting the SLA, the D.C. Council understood assault weapons to "include both automatic and semi-automatic weapons," as well as "some handguns and rifles," a class of weapons it found have little or no social benefit but at the same time pernicious consequences for the health and safety of District residents and visitors. *See* SLA § 2(2), D.C. Law 8-263 [Act 8-289], § 2, 37 DCR 8482 (Dec. 28, 1990) (hereafter "Findings").

The trial court dismissed this count as to all defendants, concluding that (1) the statute provides no cause of action to the District of Columbia and (2), in any case, (a) the plaintiffs failed to state a claim within the Act and (b) the SLA is an unconstitutional attempt at extraterritorial regulation, violating both the Commerce Clause and principles of due process. We therefore confront three issues:

A. Does the SLA, or any other statute by implication, give the District of Columbia a right of recovery for liability under the SLA;

B. Did the complaint sufficiently plead the defendants' liability to the plaintiffs under the SLA; and, if so,

C. Does the SLA impermissibly burden interstate commerce or violate due process?

We answer these questions in order.

A. District of Columbia

"The text of an enactment is the primary source for determining its drafters' intent." *Stevenson v. District of Columbia Bd. of Elections & Ethics*, 683 A.2d 1371, 1376 (D.C.1996) (citation and quotation marks omitted). "In the ordinary case, absent any indication that doing so would frustrate [the legislature's] clear intention or yield patent absurdity, our obligation is to apply the statute as [the legislature] wrote it." *Hubbard v. United States*, 514 U.S. 695, 703, 115 S.Ct. 1754, 131 L.Ed.2d 779 (1995) (citation and internal quotation marks omitted); *see also Peoples Drug Stores, Inc. v. District of Columbia*, 470 A.2d 751, 753-54 (D.C.1983). At the same time, we do not read statutory words in isolation; the language of surrounding and related paragraphs may be instrumental to understanding them. *See Carey v. Crane Serv. Co.*, 457 A.2d 1102, 1108 (D.C.1983). "Statutory construction is a holistic endeavor, and, at a minimum, must account for a statute's full text, language ..., structure, and subject matter." *United States Nat'l Bank of Oregon v. Independent Ins. Agents of Am.*, 508 U.S. 439, 455,

113 S.Ct. 2173, 124 L.Ed.2d 402 (1993) (citation and internal quotations marks omitted).

Applying these standards, we hold that the SLA confers a right of action on individuals who are injured, but not the District of Columbia. The statute makes manufacturers and others strictly liable in tort "for all direct and consequential damages that arise from *bodily injury or death* if the bodily injury or death proximately results from the discharge of" one of the enumerated firearms. Section 7-2551.02 (emphasis added). Bodily injury or death self-evidently can happen only to individual persons, not corporate entities. Surrounding provisions of the statute confirm the purpose to give redress to individuals. The statute does "not operate to limit in scope any cause of action, other than that provided by this [subchapter], available to a *person* injured by an assault weapon."Section 7-2551.03(c) (emphasis added). And, it affords no right of action to "a *person* injured by an assault weapon while committing a crime," or to one seeking recovery "for a *self*-inflicted injury" resulting from "a reckless, wanton, or willful discharge of an assault weapon." Section 7-2551.03(b) & (e) (emphases added). The subject of these provisions, then, is a right of action-granted, preserved, or withheld-of individuals, not government, to sue for damages arising from bodily injury or death traceable to assault weapons.[11]

---

[11] The legislative findings accompanying the Act reinforce this point, stating (among other things) that the manufacture and distribution of assault weapons "expos[es] the citizens [of] and visitors to the District [of Columbia] to a high degree of risk of serious harm," and "[a]s between the manufacturer or dealer of an assault weapon on the one hand and *the innocent victim* of the

In its brief to the division, the District distinguished between the verb the legislature used-"arise from"-and others it might have used if it meant to restrict the class of those entitled to recover damages to individuals. "Individuals' injuries," the District reasoned, "are the source of the District's damages under the SLA, including the costs of law enforcement and healthcare services that 'arise from' the 'bodily injury or death' of individuals." Br. for D.C. to Div. at 38; *see also* Reply Br. for D.C. to Div. at 23 (claiming a right under the SLA "to recover the expenses that it [has] incurred for law enforcement, health-care services, paid leave of employees, and other services" attributed to gun violence). But one need only consider the magnitude-the unboundedness-of such "damages" to realize the implausibility of the argument that the Council provided for them in the SLA by its choice of a verb and nothing else. "Arise from" may well connote a causal relation less direct and immediate than, say, "result from," but to freight it with a legislative intent to include the vast array of law enforcement costs and governmental health-care services attributable to assault weapon injuries as recoverable under the statute demands far more than the verb alone can bear. Neither it nor the addition of "consequential" to the "direct" damages recoverable expands, in our judgment, the class of those given a cause of action by the SLA.

---

discharge of an assault weapon on the other hand, the manufacturer or dealer is more at fault than the victim." Findings (14) & (15), 37 DCR at 8483 (emphasis added).

The District asserts, however, an additional and more limited claim for damages that we conclude has validity. The complaint alleges that in addition to the right of action the SLA gives the District (a claim we have rejected), the District may recover under two other statutes the medical and related expenses it has incurred as a result of third-party wrongful conduct. Specifically, D.C.Code § 4-601 *et seq.* (2001), the Health-Care Assistance Reimbursement Act of 1984 (HCARA), grants the District "an independent, direct cause of action against [a] third party for the unreimbursed value or cost of ... health-care assistance," whenever the District has "provide[d] health-care assistance to a beneficiary who has suffered an injury or illness under circumstances creating liability in [that] third party." *Id.*§ 4-602(a). "Beneficiary" means "any individual who has received health-care assistance from the District and, if applicable, that individual's guardian, conservator, personal representative, estate, dependants, and survivors." *Id.* § 4-601(1). Another statute, D.C.Code § 5-601 *et seq.* (2001), the Medical Care Recovery Act of 1978 (MCRA), similarly gives the District a "right to recover" health-care and funeral expenses it has paid for police officers and firefighters, and the costs of their extended absence with pay, from third-parties whose tortious conduct resulted in injuries to those employees. *Id.*§ 5-602.

Applied to this case, both statutes effectively give the District rights of "legal subrogation," D.C.Code § 4-602(b), to claims a beneficiary or specified District employee may have against a defendant under the SLA. Relying on these provisions, the complaint alleges that as a proximate result of the defendants' conduct, the District "has incurred and will incur

costs that are recoverable under [the HCARA and the MCRA] including: (1) health care costs and Medicaid expenses in treating victims of gun violence ...; (2) costs of care and treatment provided to officers and members of the Metropolitan Police Department and the Fire Department of the District of Columbia [injured by guns] ...; and (3) leave of absence wages and other assistance and compensation paid or to be paid police officers and firefighters ... on account of their having suffered gun injuries." Complaint, ¶ 137. None of the currently named plaintiffs fits the latter two categories, but two appear to fall within the first. Thus, as to the plaintiff Bryant Lawson, the complaint alleges that as a result of injuries he suffered from bullets "most likely ... fired by a 'machine gun' ... manufactured, imported, or sold by one of the [d]efendants," Complaint, ¶ 56, he "relied on Medicaid to pay for the surgery, hospitalization, medications, and rehabilitation he needed because of his gunshot wounds" and he "continues to rely on Medicaid to treat the frequent problems that result from his being a quadriplegic." Complaint, ¶ 58. Regarding a second plaintiff, Gregory Ferguson, the complaint alleges that as a proximate cause of having been struck by bullets from an AK-47-type weapon, he "spent several days in D.C. General Hospital and over a year in physical therapy." As to these individuals, the HCARA authorized the District to "[i]ntervene ... in [this] proceeding brought by the beneficiary,"D.C.Code § 4-604(a)(2), to attempt to recover nonreimbursed medical expenses incurred by the District for treatment. It should be viewed as having done so, and may remain in the case for that purpose.[12]

---

[12] Indeed, exercising its additional right to "[i]nstitute and

B. Rule 12(b)(6)

By its terms, § 7-2551.02 requires proof tying an assault weapon or machine gun that causes death or bodily injury to a particular manufacturer, importer, or dealer ("Any manufacturer, [etc.] of *an* assault weapon ... shall be held strictly liable ... if the bodily injury ... proximately results from the discharge of *the* assault weapon" (emphasis added)). The trial court dismissed the individual plaintiffs' claims under the statute because none of the plaintiffs could identify in the complaint "which defendant and corresponding [machine gun or assault weapon] was involved in their respective injury or death of the relevant decedent." The court acknowledged that "[t]he involvement of a recovered weapon might potentially moot many of the legal deficiencies associated with the plaintiffs' reliance on the [SLA]," but concluded that since "*none* of the individual plaintiffs bases his or her case on weapons that were actually recovered, their claims are pled on pure speculation" (emphasis in original). In our view, requiring the plaintiffs to identify with particularity the weapons that caused their injuries and the manufacturers of those weapons at this early stage of the proceedings is contrary to the usual rules of pleading, and does not justify dismissal under Rule 12(b)(6).

---

prosecute a proceeding alone (in its own or the beneficiary's name) or in conjunction with the beneficiary" to recover such expenses, D.C.Code § 4-603(a)(3), the District is free to move to amend the complaint in conformity with the rules to include other beneficiaries with claims under the SLA whose identity has come to light during these proceedings.

In substance, each individual plaintiff alleged that the injuries of which he or she complains were caused by an assault weapon or a machine gun as defined by the SLA.[13] "Under conventional liberal rules of 'notice' pleading," *West v. Morris,* 711 A.2d 1269, 1271 (D.C.1998); *see* Super. Ct. Civ. R. 8(a), those allegations were sufficient to state a claim because dismissal under Rule 12 is proper only if it is apparent "beyond doubt the plaintiff [s] can prove no set of facts in support of [their] claim[s] which would entitle [them] to relief." *Owens v. Tiber Island Condo. Ass'n,* 373 A.2d 890, 893 (D.C.1977). *See also Diamond v. Davis,* 680 A.2d 364, 371 (D.C.1996) ("Under the Superior Court Civil Rules ... the plaintiff need only plead facts sufficient to put the defendants on notice of the claims brought against them. A plaintiff need not plead his evidence at all.") (internal citation omitted); *Vincent v. Anderson,* 621 A.2d 367, 372 (D.C.1993) (issue of "whether or not appellant[s] had available evidence sufficient to prove the allegations in [their] complaint""really had nothing to do with the legal

---

[13] For example, the complaint alleged that Andre Wallace, the son of plaintiff Laura Wallace, and Natasha Marsh, the daughter of plaintiff Madilia Marsh-Williams, were shot and killed by three men, at least one of whom was armed with a 9mm pistol. Complaint, ¶ 82. Nine-millimeter bullets were recovered from the bodies of both victims. Complaint, ¶ 87. "On information and belief, the bullets that killed Wallace and Marsh were fired by a 'machine gun' or 'assault weapon' as those terms are defined by the Strict Liability Act."*Id.* Only the plaintiff Lawson qualified his allegation by stating that he was "most likely" shot by a weapon covered by the Act, but that does not affect the sufficiency of the allegation.

sufficiency of the complaint"). The trial court found "no excuse for [each plaintiff's] inability to assert which defendant's weapon was used to harm him, if this fact is knowable at all," but that criticism is premature, as is the court's comment that the defendant manufacturers and distributors "surely have no access to the weapons that were physically associated" with the individual plaintiffs' claims. The plaintiffs point to several avenues for linking a firearm to a particular manufacturer that may be open to them in discovery, and even if all seem "speculative" to us as a way of arriving at that link, none may be rejected at this stage. *See Arnold v. Moore*, 980 F.Supp. 28, 37 (D.D.C.1997) (dismissal inappropriate even though prisoner-plaintiff had "fail[ed] to identify or name the [individual prison-officer] defendants who allegedly assaulted [him]"; "[i]f, after discovery, the plaintiff still has not provided the names of the defendant ... officers ..., the Court may make a determination at that time whether ... judgments should be granted in favor of the defendants"); *and see, by contrast, Bly v. Tri-Cont'l Indus., Inc.*, 663 A.2d 1232, 1236 (D.C.1995) (summary judgment properly granted manufacturers *after discovery* for "lack of evidence as to which of [defendant's] products" caused plaintiffs' injuries).

In *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), the Supreme Court stated:

> [A]ll the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which its rests.... Such simplified "notice pleading" is

> made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. Following the simple guide of [Fed.R.Civ.P.] Rule 8(f) that "all pleadings shall be so construed as to do substantial justice,"[14] we have no doubt that [plaintiffs'] complaint adequately set forth a claim and gave the [defendants] fair notice of its basis.

Id. at 47-48, 78 S.Ct. 99 (footnotes omitted). Although we are less certain in this case about the adequacy of the complaint under these principles, we likewise follow Rule 8(f)'s command in holding that the plaintiffs have satisfied the pleading requirements of Rule 8. At the same time, however, if they are unable after discovery to tie a particular defendant to a particular injury-producing weapon, they will not be entitled to proceed under the Act against that defendant.

C. Constitutional Challenges

Acts of the legislature are presumptively valid, *see Regan v. Time, Inc.*, 468 U.S. 641, 652, 104 S.Ct. 3262, 82 L.Ed.2d 487 (1984), and thus a court may invalidate an otherwise lawful enactment "only upon a plain showing that [the legislature] has exceeded its constitutional bounds." *United States v. Morrison*, 529 U.S. 598, 607, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000). Nevertheless, the defendants

---

[14] *See* Super. Ct. Civ. R. 8(f).

argue that the SLA violates both the Commerce Clause and due process principles applicable to the District through the Fifth Amendment. In essence their argument is that, by imposing strict liability on firearms manufacturers for conduct that is wholly lawful where it takes place-*i.e.*, the lawful manufacture, production and distribution of firearms outside of the jurisdiction of the statute-the SLA impermissibly burdens the lawful interstate commerce of firearms and "arbitrarily" attempts to impose a regulatory scheme beyond the boundaries of the jurisdiction enacting it. We consider first the Commerce Clause argument, then the claim of violation of due process. Neither argument persuades us.

1. Commerce Clause

"Though phrased as a grant of regulatory power to Congress, the [Commerce] Clause has long been understood to have a 'negative' [or dormant] aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Sys. v. Department of Envtl. Quality*, 511 U.S. 93, 98, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994); *see District of Columbia v. Eastern Trans-Waste of Md., Inc.*, 758 A.2d 1, 16 (D.C.2000). Of course, "[l]egislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution." *Head v. New Mexico Bd. of Exam'rs in Optometry*, 374 U.S. 424, 428, 83 S.Ct. 1759, 10 L.Ed.2d 983 (1963) (citations and internal quotation marks omitted). In particular, "the Constitution when conferring upon Congress the regulation of commerce, ... never intended to cut the States off

from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country." *Id.* (internal quotation marks omitted). Under the "two-tiered approach" adopted by the Supreme Court,

> [w]hen a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the [s]tate's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.

Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986) (citations omitted).

The vice against which the first, or anti-discrimination, component of this test operates is "local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent." *C & A Carbone, Inc. v. Town of Clarkstown, New York*, 511 U.S. 383, 390, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994). No serious argument is made that the SLA exhibits economic protectionism. Because there *are* no legal manufacturers, distributors, or sellers of assault weapons and machine guns in the District of

Columbia,[15] the SLA does not discriminate in favor of in-state business or economic interests against their out-of-state counterparts. *See Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 125, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978) ("[S]ince there are no local producers or refiners, such claims of disparate treatment between interstate and local commerce would be meritless."). And, contrary to what the defendants do argue, the SLA does not "directly regulate[ ] ... interstate commerce." *Brown-Forman Distillers Corp.,* 476 U.S. at 579, 106 S.Ct. 2080. It does not regulate in any direct sense, but instead imposes liability in tort for harm caused by an abnormally dangerous subset of firearms; and it limits that right of action to injuries incurred in the District of Columbia. It may have *effects* outside of the District if manufacturers alter their business practices to avoid that liability, but "[l]egislation ... may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution." *Head,* 374 U.S. at 428, 83 S.Ct. 1759 (citation and internal quotation marks omitted). *See Sherlock v. Alling,* 93 U.S. 99, 103, 23 L.Ed. 819 (1876) (state statute "declar[ing] a general principle respecting the liability of all persons within the jurisdiction of the State for torts resultin[g] in the death of parties injured" does not offend the dormant Commerce Clause); *Stone v. Frontier Airlines, Inc.,* 256 F.Supp.2d 28, 46 (D.Mass.2002) (rejecting argument that "the dormant Commerce Clause precludes state tort law from regulating any activity that, while having local effects, also effectuates some external consequences").

---

[15] The manufacture and distribution of machine guns is prohibited in the District, D.C.Code § 7-2504.01 (2001), as is their possession. *Id.* §§ 7-2502.01 & -2502.02(a)(2).

The defendants rely primarily on *Brown-Forman, supra,* and *Healy v. The Beer Institute,* 491 U.S. 324, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989), both of which struck down state price control or "price affirmation" statutes that had "the undeniable effect of controlling commercial activity occurring wholly outside the boundary of the State" that enacted them. *Id.* at 337, 109 S.Ct. 2491. But in contrast to these statutes, the Strict Liability Act "does not regulate the price of any out-of-state transaction, either by its express terms or by *its inevitable effect.*" *Pharmaceutical Research & Mfrs. of Am. v. Walsh,* 538 U.S. 644, 669, 123 S.Ct. 1855, 155 L.Ed.2d 889 (2003) (emphasis added; internal quotation marks omitted). That the risk it creates of damage awards in the District may conceivably affect the defendants' pricing or insurance decisions related to a limited class of the products they manufacture is not the "direct[ ] control[of] commerce," *Healy,* 491 U.S. at 336, 109 S.Ct. 2491 that the Commerce Clause forbids without more.

The validity of the SLA thus depends on whether it "imposes a burden on interstate commerce that is 'clearly excessive in relation to the putative local benefits.' " *C & A Carbone, Inc.,* 511 U.S. at 390, 114 S.Ct. 1677 (quoting *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970)). State regulation on subjects "relating to the health, life, and safety of ... citizens," *Head,* 374 U.S. at 428, 83 S.Ct. 1759 receives special deference in that analysis. *See Smith v. District of Columbia,* 436 A.2d 53, 58 (D.C.1981); *Electrolert Corp. v. Barry,* 237 U.S.App. D.C. 328, 331, 737 F.2d 110, 113 (1984). The "benefits" of the SLA to the District of

Columbia are reflected in the legislative findings that accompanied its passage. The D.C. Council found (a) that "the increase in homicides in the District has been accompanied by a proliferation of use of assault weapons (*i.e.*, automatic and semi-automatic guns) in the community," with "[s]emi-automatic handguns represent[ing] a growing percentage of the handguns recovered by the [police and] ... involved in handgun crime"; (b) that "[a]ssault weapons, and the manufacture and distribution of assault weapons are abnormally and unreasonably dangerous, and pose risks to the citizens of and visitors to the District which far outweigh any benefits that assault weapons may bring"; (c) that "[i]t is foreseeable by manufacturers and distributors of assault weapons that the criminal or accidental use of assault weapons will cause injury and death"; and (d) that the manufacture and distribution of these weapons "are among the proximate causes of the rising number of homicides in the District, exposing the citizens [of] and visitors to the District to a high degree of risk of serious harm." Findings (9), (10), (12), (13), & (14), 37 DCR 8483. The legislation, in short, addresses a pressing concern for public safety by giving innocent victims of gun violence in the District a cause of action against manufacturers or dealers for injuries caused by particularly dangerous firearms whose destructiveness far outweighs any legitimate utility they have.

In contrast to this strong governmental interest, any effect the SLA would have on interstate commerce is "incidental ... [and not] clearly excessive in relation to the ... local benefits." *Pike*, 397 U.S. at 142, 90 S.Ct. 844. Only firearms the Council has

classified as "abnormally and unreasonably dangerous"-those designed essentially to kill or intimidate, and for no other purpose in private hands-are covered by the Act, and liability attaches only for death or injuries resulting from the discharge of one of these weapons in the District of Columbia-and then only when the link has been established between a specific manufacturer and the gun that caused the injury. Moreover, assault weapons "originally distributed to a law enforcement agency or ... officer" are excluded from the statute's reach, § 7-2551.03(a), as are firearms used by persons injured while committing crimes or who injured themselves.[16] Section 7-2551.03(b), (e). Given these limitations, it is not apparent to us why the SLA's effect on interstate commerce is greater than that of other state laws imposing liability in tort on manufacturers of defective or abnormally dangerous products. *See, e.g., Tigue v. E.R. Squibb & Sons, Inc.*, 136 Misc.2d 467, 518 N.Y.S.2d 891, 897 (N.Y.Sup.Ct.1987), *aff'd*, 139 A.D.2d 431, 526 N.Y.S.2d 825 (1988), *aff'd sub nom. Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 541 N.Y.S.2d 941, 539 N.E.2d 1069 (1989) (holding that relaxation of the traditional product identification requirement in tort law to provide a forum to innocent victims of the drug DES was not a "clearly excessive" burden "in relation to the putative local benefits" and, hence, was not violative of the Commerce Clause). The defendants profess alarm that the SLA, if upheld, will require them to alter their legal business practices on a national and international level. But given the limitations on the reach of the Act we have

---

[16] To that extent, the statute incorporates the common-law defense of assumption of risk.

described, that fear seems fanciful, especially since it stems mainly from concern with the broader remedies the plaintiffs have sought-*i.e.*, injunctive and "abatement" relief-for the alleged negligence and public nuisance,[17] claims we have rejected here. In any event, the fact that exposure to "product liability in tort, whether strict or otherwise," may also

> affect commercial decisions by actors in other states, such as ... manufacturers, does not implicate the Commerce Clause. Differences in the conditions and risks of doing business from state to state are in part the inevitable result of *any* state economic regulation, but the effects that these differences have on commercial decisions, even those that involve interstate trade, are not by themselves nearly so direct as to 'affect commerce' in the constitutional sense.

Bowman v. Niagara Mach. & Tool Works, Inc., 832 F.2d 1052, 1056 (7th Cir.1987) (emphasis in original).

2. Due Process

"A person who sets in motion in one State the means by which injury is inflicted in another may, consistently with the due process clause, be made

---

[17] See Br. for Appellees to Div. at 71 ("By the injunctive relief or 'abatement' they request, plaintiffs ultimately seek broad reforms in defendants' national and international business practices according to plaintiffs' own policy preferences.").

liable for that injury whether the means employed be a responsible agent or an irresponsible instrument." *Young v. Masci*, 289 U.S. 253, 258, 53 S.Ct. 599, 77 L.Ed. 1158 (1933). As we have seen, the SLA imposes liability on out-of-state manufacturers of firearms (there are none in the District) for injuries caused to innocent persons from the "discharge of [an] assault weapon or machine gun *in the District of Columbia*." D.C.Code § 7-2551.02 (2001) (emphasis added). The defendants nevertheless argue that the SLA constitutes an attempt by the District to impose its own policy choices as to gun regulation on other states where the manufacture of machine guns is lawful, thereby violating due process. They rely principally on *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996)-or more precisely on two sentences from *Gore*.The first is the Court's statement that "it follows from ... principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." *Id.* at 572, 116 S.Ct. 1589. The second, providing the due process link, is that " '[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.' " *Id.* at 573 n. 19, 116 S.Ct. 1589 (citation omitted).

The defendants first of all confuse punishment-and the issue of punitive damages before the Court in *Gore*-with a state's authority to permit compensation to victims for injuries suffered within its jurisdiction. In *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003), which also dealt with punitive damages and applied *Gore*, the Court made that distinction

explicit. *See id.* at 416, 123 S.Ct. 1513 (explaining the "different purposes" served by compensatory and punitive damages). One looks in vain in either *Gore* or *State Farm* for a suggestion that a state may not permissibly decide that certain products, whether manufactured within or outside a state, are so dangerous that their manufacturers should face strict liability in tort for injuries the products contribute to within the State. *Gore,* in fact, affirmed a state's right to impose "economic penalties" on out-of-state manufacturers, "whether the penalties take the form of legislatively authorized fines or judicially imposed punitive damages," so long as such penalties are "supported by the State's interest in protecting its own consumers." *Gore,* 517 U.S. at 572, 116 S.Ct. 1589.[18] Under *Gore,* the SLA would violate due process only if it penalized manufacturers "for conduct that was lawful where it occurred *and that had no impact on* [*the District*] *or its residents.*" *Id.* at 573, 116 S.Ct. 1589 (emphasis added); *see also State Farm,* 538 U.S. at 422, 123 S.Ct. 1513 (for punitive damage purposes, "[l]awful out-of-state conduct may be probative" if it has "a nexus to the specific harm suffered by the plaintiff"). In sum, no due process issue is raised by legislation that seeks to redress injuries suffered by District residents and visitors resulting from the manufacture and distribution of a particular class of firearms whose lethal nature far outweighs their utility. *See, e.g.,*

---

[18] The SLA does not provide for any award of punitive damages; by its terms it permits recovery only for "all direct and consequential damages." D.C.Code § 7-2551.02.

City of Boston v. Smith & Wesson Corp., 66 F.Supp.2d 246, 250 (D.Mass.1999) ("As plaintiffs here are seeking relief only on behalf of injured parties in Massachusetts, the holding of the *Gore* case does not apply.").

VI. Conclusion

For the foregoing reasons, the judgment of the Superior Court is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

APPENDIX E

OPINION OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA (DECEMBER 16, 2002)

DISTRICT OF COLUMBIA, *et al.*
v.
BERETTA, U.S.A., CORP., *et al.*, Appellees.

No. 2000 CA 042800

Honorable Cheryl M. Long

Memorandum Opinion and Order

The crux of this lawsuit is that the District of Columbia and various individual plaintiffs endeavor to hold certain gun manufacturers financially liable for the economic impact of gun violence in the District of Columbia. More specifically, the individual plaintiffs seek financial compensation for their own damages, while the District pursues both monetary damages and injunctive relief.

The purpose of the instant opinion is to adjudicate the defendants' Motion for Judgment on the Pleadings, as well as the plaintiffs' "Third Motion for Leave to Amend Complaint."The latter is preliminary to the dispositive motion.

The plaintiffs are proceeding under an array of legal theories, and the defendants have raised multi-faceted legal challenges to every allegation of the Complaint. Those challenges embrace issues that are

statutory, constitutional, or otherwise rooted in well-established common law.

The heart of the defense motion is that the claims articulated by the plaintiffs are not subject to trial on the merits, either because of the failure to plead vital parts of the allegations, or because of rather specific legal barriers. In other words, defendants contend on multiple fronts that the claims are facially not properly before the Superior Court at all.

The procedural mode of attack presented by the defendants is tightly limited by the Rules of Civil Procedure. It is important at the outset to be clear about the role of the trial court. When a Motion for Judgment on the Pleadings is utilized, the trial court is not asked (and is not permitted) to pass judgment upon the underlying merits of the claims or to pass judgment on the wisdom of filing the suit. Instead, pursuant to Rule 12(c) of the Superior Court Civil Rules, a defendant's motion for judgment in its favor is based solely on what is stated strictly within the plaintiffs' own pleadings. Here, the pertinent pleading that is the subject of the motion is the Complaint, as it was originally filed and later amended for the purpose of adding more individual plaintiffs.

A Motion for Judgment on the Pleadings is to be adjudicated under the same standards that apply to a Motion to Dismiss for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6) of the Civil Rules. *See Osei-Kuffnor v.*

Argana, 618 A.2d 712, 713 (D.C.1993).[1] There is ample Rule 12(b)(6) case law that provides the standard for granting such relief. The law is clear that such a judgment in favor of the defendants would be supportable only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief" *Owens v. Tiber Island Condo. Ass'n,* 373 A.2d 890, 893 (D.C.1977); *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

When a trial court adjudicates a motion under either Rule 12(b)(6) or Rule 12(c), the "complaint must be construed in the light most favorable to the plaintiff, and its allegations taken as true." *McBryde v. Amoco Oil Co.,* 404 A.2d 200, 202 (D.C.1979); *Atkins v. Indus. Telecomm. Ass'n,* 660 A.2d 885, 887 (D.C.1995).

The parties in this action have presented very detailed and voluminous briefs and materials.[2] At the Court's invitation, they have submitted post-argument citations to case law that has been developing in other jurisdictions during the pendency of this case. Indeed, the instant case is one of first impression in the District of Columbia. The attorneys on both sides have cited case law from other jurisdictions, not because such decisions are controlling, but because the scrutiny by appellate

---

[1] Federal courts agree, as to the application of their analogous Rules. *See Westcott v. City of Omaha,* 901 F.2d 1486, 1488 (8th Cir.1990); *Morgan v. Church's Fried Chicken,* 829 F.2d 10, 11 (6th Cir.1987).

[2] Plaintiffs are supported by Amicus Curiae.

courts of similar lawsuits can be useful and instructive.

As to the plaintiffs' motion regarding leave to amend the Complaint for a third time, the Court will grant the motion even though the defendants oppose it. While this will not affect the ultimate outcome of the defendants' motion, there is no sound reason to prevent the plaintiffs from their final attempt to include one last group of individual plaintiffs and their allegations. This Memorandum Opinion addresses all versions of the Complaint, including the Third Amended Complaint.

Based upon the following analysis of relevant case law and bedrock legal principles, this Court concludes that the arguments of the defendants are compelling as to the entry of judgment in their favor. The plaintiffs' myriad claims herein are burdened with many layers of legal deficiencies. The defendants are entitled to judgments in their favor even if every allegation in the Complaint is true.

THE PARTIES

The two original plaintiffs are the District of Columbia and Bryant Lawson. Later, other individual plaintiffs were added in the First Amended Complaint, as well as the Second Amended Complaint. In the First Amended Complaint, the additional plaintiffs are James Foster-el and Michelle Foster-el. In the Second Amended Complaint, the additional plaintiff is Patrick H. Mahoney. Both James Foster-el and Michelle Foster-el are acting as individuals as well as in their capacities of Co-Personal Representative of the

decedent's estate of Helen Foster-el. They are her surviving husband and daughter. Mahoney is suing in his individual capacity as well as his capacity as the Personal Representative of the decedent's estate of Mary Caitrin Mahoney, his daughter.

A Third Amended Complaint is attached to the plaintiffs' motion, and they seek an order of this Court that would deem this amended version of the Complaint to have been filed as of the date on which the original Complaint was filed. In their motion, plaintiffs seek to add five more individual plaintiffs. Two are Personal Representatives of decedents estates and three are persons who were injured by gunshots, but who survived. See further discussion, *infra*.

The named defendants in this action are corporations engaged in the lawful manufacture and legal distribution of firearms. They are: Beretta U.S.A. Corp., B.L. Jennings, Inc., Browning Arms Company, Bryco Arms, Inc., Carl Walther GMBH, Century International Arms, Inc ., Colt's Manufacturing Co., Inc., Davis Industries, Inc., Forjas Taurus, S.A., Glock, Inc., Glock GMBH, H & R 1871, Inc., Heckler & Koch, Inc., Heckler & Koch, GMBH, Hi-Point Firearms, K.B.I., Inc., International Armament Corp., Navegar, Inc., Norinco Sports, U.S.A., Inc., Phoenix Arms, Inc., Pietro Beretta SP.A., Sigarms, Inc., Smith & Wesson, Corp., Strum, Ruger & Company, Inc., and Taurus International Manufacturing, Inc., and DOES 1-100.

THE ORIGINAL COMPLAINT

The Complaint that commenced this litigation was filed on January 20, 2000. It contains five Counts, preceded by a narrative theory as to how the defendants are connected to generalized "gun violence" in the District of Columbia. The allegations in the original Complaint are repeated almost verbatim in the First Amended Complaint, the Second Amended Complaint, and the proposed Third Amended Complaint. The five basic Counts are summarized briefly as follows, cited only to the original Complaint, for simplicity and ease of reference.

Certain theories of liability appear to thread through more than one Court. For example, Counts IV and V do not actually raise issues that are new and distinct from the substantive causes of action that are recited in other Counts. Counts IV and V are more in the nature of an operational theory as to how the District asserts its right to sue and how the damages should be determined in light of the multiplicity of defendants.

Count I-Strict Liability

In Count I, the District and Lawson allege that the defendants are strictly liable for money damages, pursuant to the statute known as the "Assault Weapons Strict Liability Act of 1990."Where the District is concerned, it asserts a claim for recovery of Medicaid and other health care costs, as well as other types of monetary benefits paid to District citizens and employees who have been injured by illegal weapons. The District relies upon three statutes as the legal basis for its right to sue. See D.C.Code §§ 1-624.31, 3-502, and 4-502 (1981). These

statutes are described further herein, cited to their current codification.

The "Assault Weapons Strict Liability Act of 1990," provides,

> Any manufacturer, importer, or dealer of an assault weapon or machine gun shall be held strictly liable in tort, without regard to fault or proof of defect, for all direct and consequential damages that arise from bodily injury or death if the bodily injury or death proximately results from the discharge of the assault weapon or machine gun in the District of Columbia.

D.C.Code § 7-2551.02 (2001).[3] This particular law states that the term "assault weapon" includes certain specific weapons enumerated according to their trade names, such as "Street Sweeper and Striker 12." D.C.Code § 7-2551.01(I) (2001). Under the Code, a "machine gun" is defined as "any firearm which shoots, is designed to shoot, or can be readily converted or restored to shoot: Automatically, more than 1 shot by a single function of the trigger [or] Semiautomatically, more than 12 shots without manual reloading."D.C.Code § 7-2501(10)(A-B) (2001).

The District alleges in the Complaint, "As a proximate result of the discharge in the District of assault weapons and machine guns manufactured, imported, or sold by Defendants, Plaintiff District

---

[3] When originally codified, the law was found in the published Code as D.C.Code § 6-2392 (1981).

has incurred and will incur great expenses for assistance and compensation provided to victims of this gun violence."Complaint at ¶ 77.

The District links the allegation under the Assault Weapons Act to a claim for money damages, stating,

> Defendants are strictly liable to Plaintiff District for (1) health care costs and Medicaid expenses the District has incurred for care and treatments of victims of this gun violence and (2) costs of other assistance and compensation provided or paid by the District to police officers, firefighters, and other District employees who have suffered injuries from this gun violence, which costs are recoverable under District statutes. D.C.Code §§ 1-624.31, 3-502, and 4-502. Defendants also are liable for any other costs incurred by the District that are recoverable by statute, in equity, or under common law.

Complaint at ¶ 78.

The three statutes under which the District seeks such reimbursements are described below.

First, under the "Health-Care Assistance Reimbursement Act of 1984," the Code provides, in pertinent part:

Whenever the District provides health-care assistance to a beneficiary who has suffered an injury or illness under circumstances creating liability in a third party or under circumstances that

would have created such a liability had the beneficiary instead of the District incurred the expense of the health-care assistance, it shall have an independent, direct cause of action against that third party for the unreimbursed value or cost of the health-care assistance provided.

As soon as the District begins providing health-care assistance to a beneficiary, it shall become subrogated to any right or claim that the beneficiary has against a third party for the care and treatment it has undertaken to provide or pay for as health-care assistance. D.C.Code § 4-602(a)-(b) (2001) (emphasis added).[4]

Second, under the "Medical Care Recovery Act of 1978," the Code addresses the issue of how the District may recover medical and leave expenses for firefighters and police officers. The Code provides in pertinent part,

Whenever the District of Columbia is authorized or required by law to: (1) Furnish or pay the expenses for hospital, medical, surgical, dental care and treatment (including prostheses and medical appliance) or the funeral expenses of an officer or member of the Metropolitan Police Department or the Fire Department of the District of Columbia (hereinafter, "policeman or fireman"); or (2) extend leave of absence with pay to a policeman or fireman who is injured or suffers a disease under

---

[4] The law formerly was codified as D.C.Code § 3-502(a)-(b) (1981).

circumstances creating a tort liability upon a 3rd person to pay damages therefor, whether or not received or contracted in the performance of duty, the District of Columbia shall have a right to recover from said 3rd person the reasonable value of the care and treatment so furnished or to be furnished, or for which payment has been or will be made, and the amount of wages paid or to be paid during the leave of absence resulting therefrom, and shall as to such right be subrogated to any right or claim which the injured or diseased policeman or fireman, his guardian, personal representative, estate, dependents, or survivors has or have against such 3rd person to the extent of the reasonable value of the care and treatment so furnished or to be furnished, or for which payment has been or will be made, and the amount of wages based upon an authorized leave of absence paid or to be paid to such policeman or fireman. D.C.Code § 5-602 (2001) (emphasis added).[5]

Third, pursuant to the "Comprehensive Merit Personnel Act of 1978," individual employees may seek compensation for injury or death, if incurred in the performance of his or her public duty. As to subrogation of such claims, the Code states,

If an injury or death for which compensation is payable under this subchapter is caused under circumstances creating a legal liability on a person other than the District of Columbia government to pay damages, the Mayor *may require the beneficiary to do the following: (A) Assign to the District of Columbia government any right of action he or she*

---

[5] This law was previously codified as D.C.Code § 4-502 (1981).

may have to enforce the liability ... or (b) Prosecute the action in his or her own name.

D.C.Code § 1-623.31(a)-(b) (2001) (emphasis added).[6] The Code further specifies, "The Mayor may prosecute or compromise a cause of action *assigned* to the District of Columbia government."D.C.Code § 1-623.31(c) (2001) (emphasis added).[7]

Count II-Negligent Distribution

In Count II, the District and Lawson allege that the defendants engaged in "negligent distribution" of firearms. The plaintiffs described the "negligence" as consisting of the following factual theory.

Plaintiffs allege that the defendants have failed to take certain steps, which, in the view of the plaintiffs, could prevent the "unlawful flow" of firearms into the District of Columbia. Plaintiffs describe in the Complaint the various ways in which firearms have "unlawfully flowed" into this jurisdiction. They assert, for example,

> Many firearms have flowed unlawfully into the District by means of a 'straw purchase.' In a 'straw purchase,' the purchaser buys a firearm from a licensed dealer on behalf of another person who is not qualified to

---

[6] This provision was previously codified as D.C.Code § 1-624.31(a)-(b) (1981).

[7] This provision previously had been codified as D.C.Code § 1-624.31(c) (1981).

> purchase the firearm under applicable federal, state, or District laws and regulations. Many of these firearms have been later used in crime. Often, these straw purchases have occurred under circumstances that indicated or should have indicated to the seller that a straw purchase was being made. Although Defendants knew or should have known that such straw purchases take place, they have not taken reasonably available steps to ensure that their distributors and dealers do not sell to straw purchasers.
>
> Complaint at ¶ 53.

The plaintiffs further assert,

> A related method by which many firearms have flowed unlawfully into the District is through multiple sales. In such sales, the purchaser buys more than one firearm at a time or over a short period of time, from a licensed dealer with the intention of later selling or transferring some or all of the firearms to a person (or persons) who is not qualified to purchase firearms under federal, state, or District laws and regulations. Many multiple sales have occurred under circumstances that indicated or should have indicated to the seller that the firearms being purchased were destined for unlawful uses. Although Defendants knew or should have known that such multiple sales take place, they have not taken reasonably available steps

> to ensure that their distributors and dealers adequately curb such multiple sales.

Complaint at ¶ 54.

The plaintiffs allege other ways in which guns illegally enter the District. They describe, for example, so-called "kitchen table" dealers who have federal licenses to sell firearms, but who do not operate from retail stores. Complaint at ¶ 55. They also cite the problem of guns being stolen outright from licensed dealers who do not have adequate security. Complaint at ¶ 56. Plaintiffs describe how felons are able to buy weapons at "gun shows" where the sellers do not perform background checks of purchasers. Complaint at ¶ 57. The plaintiffs also complain that serial numbers are easily obliterated, so as to prevent tracing by law enforcement officers, and that defendants have failed to take steps to make serial numbers "more tamper-resistant." Complaint at ¶ 58.

Overall, the plaintiffs contend that the defendants were negligent because they had many sources from which to know all the ways guns flow illegally into the District and that they failed to take "reasonably available" steps to "restrict or impede" such unlawful traffic. They contend, for example, that the defendants failed to "adequately investigate or screen the distributors and dealers through which Defendants distribute and sell firearms," that the defendants could "establish a tighter and more direct distribution system in which Defendants remain in control of the distribution of their products," and that the defendants could "require their distributors and

dealers to refuse to sell more than one handgun per month to any person not holding a federal firearms license, and to track sales to enforce this restriction."Complaint at ¶ 65 (a), (d), and (g). The Complaint contains many other alleged methods that the defendants failed to employ to stop the illegal entry of guns into the District. The Court need not repeat all of them. It suffices to say that the examples quoted above fairly provide the gist of the sorts of actions that plaintiffs contend could have been implemented by the defendants.

On balance, the plaintiffs ultimately assert that the defendants "have the ability to require and to enforce responsible distribution practices by requiring their dealers to enter into agreements under which the dealers may be suspended or terminated for failure to adhere to specified business practices."Complaint at ¶ 66.

Specifically, in their prayer for relief, the plaintiffs seek compensatory damages "attributable to each Defendant," punitive damages, and a "permanent injunction enjoining Defendants' negligent practices in the marketing and distribution of their firearms."Complaint at p. 29.

Count III-Public Nuisance

In Count III, the District (acting as the sole plaintiff on this issue) asserts that the corporate activity of the defendants *outside* of the District of Columbia creates a common law "nuisance" *within* the District of Columbia. The District demands two forms of relief. First, the District seeks "in its *parens patriae* capacity, a permanent injunction and other

equitable relief, including but not limited to restitution, for abatement of the nuisance that Defendants have created and maintained."Second, the District demands money damages "attributable to each Defendant to compensate the District for health care assistance and other recoverable costs it has incurred and will continue to incur as a result of the ongoing nuisance created and maintained by Defendants."Complaint at p. 29.

Count IV-Subrogation Claims of the District

In Count IV, the District alleges that it is the "subrogor" of firefighters, police officers, and miscellaneous other public employees and citizens, who individually would have a basis for a lawsuit against the defendants for the costs of health care and other such claims. This Count essentially recites a broad subrogation claim by the District under the three health care reimbursements statutes cited under Counts I and II. Here, the District substitutes itself for any and all public employees or citizens who could sue the defendants on their own, under these three statutes.

Count V-Collective Liability

In Count V, the District attempts to set forth a claim described as "collective liability." No statute whatsoever is cited as grounds for this claim or this theory of calculation of damages. The plaintiffs state only that the defendants "are collectively liable for the particular harms to Plaintiffs because Defendants' tortious conduct has collectively caused the circumstances that have caused the particular harms to Plaintiffs."Complaint at ¶ 102.

ANALYTICAL FRAMEWORK FOR THE COURT'S DECISION

As the law requires, the Court gives a generous reading to the Complaint, so as to view it in the most inclusive way possible. The Court will presume, *arguendo,* that the plaintiffs intend to rely on subrogation for relief under Count I and partially under Count II. Subrogation is not relevant to Count III.

In deciding the instant motion, the Court's ruling on the legal validity of any particular theory certainly applies to that theory wherever it might appear or be implied in the Complaint. The same is true with respect to the First, Second, and Third Amended Complaints. The Counts therein are virtually identical to those in the original Complaint.

As to the case law presented by the parties from courts of other jurisdiction, this Court will quote from such authorities to the extent warranted, where such conclusions inform this Court's own determinations. These considered appellate rulings are especially helpful because they reflect thoughtful analysis of nearly identical allegations and responses thereto.

THE FIRST AMENDED COMPLAINT

The core allegations were not changed or enlarged. The operative difference between the original Complaint and the First Amended Complaint is the addition of three more individual plaintiffs.

James and Michelle Foster-el assert that Helen Foster-el was fatally shot in the District of Columbia, and that her wounds are attributable to the use of 9 mm ammunition. They specify, "The bullets that killed Helen Foster-el were fired by one or more "machine guns" or "assault weapons," as these terms are defined by the Strict Liability Act. which guns were manufactured, imported, or sold by Defendants."First Amended Complaint at ¶ 61. The substantive allegations and theories of the case remain the same as those articulated in the original Complaint.

THE SECOND AMENDED COMPLAINT

The Mahoney claim, added in the Second Amended Complaint, is similar to that of the Foster-els. It is based upon the murder of Mr. Mahoney's daughter on or about July 6, 1997, during a robbery at a District of Columbia store. The store was a Starbucks Coffee store in Georgetown. In his Complaint, Mahoney states that the robber, Carl Cooper, was armed with two weapons: a .380 caliber semi-automatic handgun and a .38 caliber revolver. Second Amended Complaint at ¶ 66. He further alleges that one .380 caliber bullet was recovered from his daughter's chest and that others passed through her body. He states, "The bullets that killed Ms. Mahoney were fired by one or more "machine guns" or "assault weapons," as these terms are defined by the Strict Liability Act, which guns were manufactured, imported, or sold by Defendants."Second Amended Complaint at ¶ 72.

PLAINTIFFS' MOTION REGARDING THIRD AMENDED COMPLAINT

In their pending motion, the plaintiffs seek to add five individual plaintiffs to this case: Laura Wallace, Madilla R. Marsh-Williams, Ahmad Vaughan, Avery Blue, and Gregory Ferguson.

Wallace and Marsh-Williams desire to sue personally and in their respective capacities as the Personal Representatives of the estates of Andre Wallace and Natasha Marsh. The two deceased persons were students at Wilson High School and were murdered by gunfire on February 8, 2000. The Third Amended Complaint alleges that one of the persons who attacked the pair was "armed with a 9 mm pistol."Third Amended Complaint at ¶ 82. It alleges that "police recovered nine 9 mm shell casings at the shooting scene."Third Amended Compliant at ¶ 86. Moreover, the plaintiffs contend that during autopsies, "the coroner recovered at least one 9 mm bullet from both Wallace's and Marsh's bodies."Third Amended Complaint at ¶ 87.

Where Ferguson, Vaughan and Blue are concerned, they base their proposed suit on injuries each suffered from gunfire on June 17, 1998, in the same incident. They claim that the persons who attacked them were part of a gang and that they were "armed with several weapons, including a pump shotgun, a 9 mm handgun, and an AK-47 weapon."Third Amended Complaint at ¶ 92. They allege that they were each "hit by the AK-47-type weapon."Third Amended Complaint at ¶¶ 101-103.

The plaintiffs' motion is opposed by the defendants. They contend that the Court should not permit the filing of this third version of the Complaint for a variety of reasons, but largely because the claims have no merit. Defendants' Memorandum in Opposition to Plaintiffs' Third Motion for Leave to Amend Complaint at 10-11. The defendants also complain that adding more plaintiffs causes prejudice to the defendants by enlarging the complexity of the case. One of the main contentions of the defendants is that the attempt to add these particular plaintiffs is a mask for generating sympathy for a case that is legally weak. Defendants argue,

> The District undoubtedly hopes to bolster its generalized claims by any sympathy that can be generated from the specific situations of these unrelated individual plaintiffs. The District's desire for such a coattail effect does not justify the joinder of disparate claims seeking different relief and based on different underlying facts.

Memorandum in Opposition at 7-8.

The Court is convinced that it would be unfair to deny this particular motion, because the case is at a very early stage and there is no discernable prejudice to the defendants at this juncture. The arguments in the lawsuit do not change in the proposed Third Amended Complaint, and the litigative burden on the defendants is no different. Usually, leave is freely granted to amend a Complaint, as long as a case is in the early stages of litigation, where there is no bad faith, and where the new aspect of the Complaint does not work any palpable prejudice on the

defendants. *See Bennett v. Fun & Fitness of Silver Hill, Inc.*, 434 A.2d 476, 478-79 (D.C.1981). To the extent that defendants point to a difficult and complex theory of liability as evidence of "prejudice," this argument is not meritorious. The complexities of the plaintiffs' theory of liability only highlight that the plaintiffs have a difficult case to prove. This is not prejudicial to the defendants.

The Court notes that the plaintiffs have vowed not to attempt any more additions of new plaintiffs. They state, "Plaintiffs have no intention, absent unforeseen circumstances, to further move to amend our complaint to add additional plaintiffs." Third Motion for Leave to Amend Complaint at 3.

Indeed, this Court would not expect the District to attempt to enlarge this case any further, because there cannot be any such circumstances that are "unforeseen." The District has contended that the individual plaintiffs themselves sought out legal representation by the Office of Corporation Counsel. There is no basis for doubting this statement.[8] There is no real exigency of the District of Columbia that

---

[8] This is a credible assertion by the plaintiffs, because if the District had been trolling for cohort plaintiffs, it presumably would have selected victims of crime who were injured or killed by guns that were actually recovered. The involvement of a recovered weapon might potentially moot many of the legal deficiencies associated with the plaintiffs' reliance on the Strict Liability Act. If anything, relying on allegations based on incidents of non-recovered weapons is certainly not the best strategy for this debut litigation under the Strict Liability Act. See further discussion, *infra* in text regarding Count I.

should suddenly, in the future, create a real need for the District to add more and more parties to the case. This is not a class action, and the District owes no duty to provide free legal services to any individual plaintiffs. Apparently, the District has done so here for its own reasons. Moreover, the existing individual plaintiffs have no particular need to add others to their case, since the contentions are all fact-bound as to the person involved. Merely adding other plaintiffs does nothing to improve the quality of any other plaintiff's case.

Understandably, the defendants are wary that the District seeks the advantage of name-recognition of some of the plaintiffs, because of the well-publicized circumstances of their deaths. However, this has no bearing on the legal issues that compel granting the defendants' motion, and the sympathy theory is not strong enough otherwise to deny the plaintiffs' procedural motion. Since this Court's grant of the defense motion is on grounds that would apply to any plaintiff making the same assertions, it is not logical or practical to leave the litigation in an uncertain posture, creating a needless controversy over the denial of leave to amend the Complaint.

ISSUES RAISED BY DEFENDANTS

Reviewing each of the Counts, the essence of the defendants' motion is summarized as follows.

In Count I (strict liability), defendants contend that the plaintiffs cannot establish the requisite elements to plead or recover damages under the District's "Assault Weapon Strict Liability Act." The defendants identify specific aspects of the claim

itself, to illustrate why there can be no recovery under this statute, even if all the allegations in Count I are true. Moreover, the defendants contend that this particular law is unconstitutional, as a prohibited form of infringement upon interstate commerce. In this regard, defendants assert that the Act impermissibly seeks to regulate lawful conduct that occurs outside the geographical boundaries of the District of Columbia.

As to Count II (negligent distribution), defendants emphasize that the allegations cannot be sustained as a matter of law because there is no common law duty that could have been breached, and because the claims are too remote to establish proximate cause.

Count III (common law public nuisance) is challenged because, as defendants argue, key elements of the claim cannot be established by any means. Those pivotal elements are in the alternative, (a) the use of land in creating or perpetuating the alleged nuisance, or (b) the existence of a statute that permits such a lawsuit, whether or not land is involved. Defendants argue that the nature of common law public nuisance cannot be stretched to serve as a basis for relief in this particular lawsuit.

Regarding Count IV, defendants seek a judgment in their favor based upon the failure of the plaintiffs to plead certain specific facts that are necessary to create individual, subrogated claims. Existing law already requires such specific pleading. Defendants add that the District, as a matter of law, has no right to group together *aggregated* subrogation claims, so as to create liability "in gross."

Count V is challenged because case law precludes the District from seeking money damages to reimburse it for the cost of public safety services, including police and fire services that are related to gun violence. In short, defendants argue that this aspect of the lawsuit is not legally sustainable because of the "professional rescuers doctrine," already recognized in the law of the District of Columbia. Moreover, defendants specifically attack the use of "collective liability" theory under which money damages might be calculated. This argument includes an attack on the plaintiffs' so-called "market share" analysis as a theory for assessing and apportioning damages amongst the various defendants. Whether or not using that terminology, however, the defense attacks any formulation of damages that would be predicated upon non-individualized liability.

ANALYSIS OF THE ISSUES

The most efficient approach to parsing the issues is to examine the particular legal arguments raised by defendants, and to compare their merits to the responses of the plaintiffs. In this fashion, relating to each cause of action in the Complaint, the failure to sufficiently plead the allegations is best exposed.

It is not particularly helpful to discuss the issues in the same numeric order in which they are raised in the Counts of the Complaint. There is an interplay between the Counts, each of which provides context for another. Consequently, the Court will begin its analysis with the more fundamental issues regarding negligence and nuisance (Counts II and III). The case

law that is instructive in these areas forms a solid background for treatment of the more detailed questions or narrower issues raised in Counts I, IV, and V.

Count II: Negligence-Absence of Legal Duty and Remoteness of the Claims

In addition to reliance upon the Strict Liability Act, the District and other plaintiffs demand damages under a theory of common law negligence. The defendants attack the sufficiency of the pleading by emphasizing that the key elements of common law negligence cannot be established as a matter of law, even if the factual allegations of the Complaint are true. They argue that (1) defendants do not owe a duty to the plaintiffs and (2) even if such a duty exists, the plaintiffs have no standing to sue because their claims are too remote to establish proximate cause. Defendants rely upon local common law to demonstrate the absence of a legal duty. They also cite relevant appellate law from state and federal courts, where this same type of lawsuit has met with failure for the same reasons argued by defendants herein.

The plaintiffs in this case are not the first to launch this type of litigation. Very seldom has a claim of this nature survived on appeal after the initial dismissal of the Complaint.

It is efficient to divide an analysis of the common law negligence claim into separate discussions of (1) the absence of a legal duty, and (2) the remoteness or proximate cause issue.

*1. The Lack of a Legal Duty.*The real underpinning of the demand for damages in this case is that damages arise from the intervening behavior of criminals. The District of Columbia Court of Appeals has observed, "In general no liability exists in tort for harm resulting from the criminal acts of third parties, although liability for such harm sometimes may be imposed on the basis of a special relationship between the parties." *Hall v. Ford Enter. Ltd.*, 445 A.2d 610, 611 (D.C.1982); *see also Caldwell v. Bechtel, Inc.*, 203 U.S.App. D.C. 407, 417-18, 631 F.2d 989, 999-1000 (1980) (citing W. Prosser, HANDBOOK OF THE LAW OF TORTS, § 56, at 341-42 (4th ed.1971)).

"Traditionally, relationships that were considered to give rise to a duty of one party to protect the other party from foreseeable criminal acts of third persons have included the relationships of landowner to invitee, businessman to patron, employer to employee, school district to pupil, hospital to patient, and common carrier to passenger." *Hall, supra,* at 611 n. 4.

In terms of legally sufficient pleading, the obligation of the plaintiffs herein is to set forth, even very briefly, facts from which such a special relationship can be discerned. They have not done so. Even assuming that the plaintiffs could establish that their injuries were foreseeable by the defendants (which is a separate issue), their common law claim must fail.

In the instant case, there is absolutely no allegation of any "pre-existing" relationship between any of the plaintiffs and any of the defendants. For

this reason alone, the common law claims must fail as a matter of law.

Significantly, the District of Columbia Court of Appeals already has declined specifically to recognize any duty of a private entity to protect members of the public from injury caused by violent crime, particular involving the use of firearms. Those cases are summarized as follows.

The District of Columbia Court of Appeals has firmly held that District law does not support a cause of action against a gun manufacturer for injuries caused by the criminal use of the weapon, in the absence of any relationship between the particular plaintiff and defendant. *Delahanty v. Hinckley,* 564 A.2d 758, 762 (D.C.1989). In *Delahanty,* a police officer filed a common law negligence suit against certain manufacturers and distributors of a firearm that was used to shoot him during the attempted assassination of President Reagan. The firearm in question was known colloquially as a "Saturday Night Special."

The Complaint in *Delahanty* was filed in the United States District Court for the District of Columbia. The trial judge dismissed the suit for failure to state a claim upon which relief could be granted. On appeal, the United States Court of Appeals certified to the District of Columbia Court of Appeals the question whether, in this jurisdiction, "manufacturers and distributors of Saturday Night Specials may be strictly liable for injuries arising from these guns' criminal use."*Id.* at 759.The District of Columbia Court of Appeals answered the question

in the negative, applying its ruling to both strict liability and ordinary negligence concepts.

The Court of Appeals found that the law of the District of Columbia does not impose a duty on a firearm manufacturer to refrain from, to limit, to restrict, or to monitor the lawful, regulated, retail distribution of its products outside the District. *Id.* at 761-62.This appellate holding alone requires this Court to grant defendants' Motion for Judgment on the Pleadings as to Count II.

The ruling in *Delahanty* should not have been a surprise to anyone. Indeed, years before the ruling in *Delahanty,* the Court of Appeals concluded that the mere fact that the hazard of crime exists in the District of Columbia does not mean that a duty to protect the public from such crime is automatically imposed upon private enterprises. *See Cook v. Safeway Stores, Inc.,* 354 A.2d 507, 509 (D.C.1976). In *Cook,* a customer sued the drug store unsuccessfully for injuries she incurred while pursuing the snatcher of her purse.

The importance of *Delahanty* to the lack of common law duty in the present case cannot be minimized. The particular theory on which the plaintiff in that case sought to create a "duty" is one that is strikingly similar to the allegation of "negligent distribution" in the instant case.

In the present case, the plaintiffs assert that the manner in which the defendants permit firearms to be distributed and sold, in and of itself, is negligent. The plaintiffs contend that injuries could be avoided if, for example, the defendants would "curb" what are

described as "multiple sales" to single buyers. Yet, such sales are completely legal. In *Delahanty,* the allegation of negligence was founded upon the theory that the defendants knowingly allowed the sale of inexpensive handguns known as "Saturday Night Specials." Delahanty alleged in his Complaint,

> Hinckley needed an easily concealable weapon for his assassination attempt; the gun manufactured by Roehm and R.G. Industries, Inc., is an easily concealable, inexpensive handgun; the gun is poorly constructed, unreliable, and therefore not useful for legitimate purposes such as military use, target practice, or self-defense; as a result of the gun's low price, it is used for criminal purposes; and the manufacturers knew of the gun's criminal uses.

Id. at 759.

In rejecting the negligence theory, the Court of Appeals in *Delahanty* stated, "[W]e conclude that traditional tort theories-negligence and strict liability under the RESTATEMENT (SECOND) OF TORTS-provide no basis for holding the gun manufacturer liable."*Id.* at 759-60.The Court elaborated as follows:

> Appellants argue that the marketing of the guns is the abnormally dangerous activity for which the manufacturers should be held liable. We cannot agree. The cause of action under RESTATEMENT § 519 applies only to activities that are dangerous in themselves and to injuries that result

> directly from the dangerous activity. 'The marketing of a handgun is not dangerous in and of itself, and when injury occurs, it is not the direct result of the sale itself, but rather the result of actions taken by a third party.'

Id. at 761 (quoting *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1265 n. 43 (5th Cir.1985)).

The Court of Appeals added,

> Furthermore, handgun marketing cannot be classified as abnormally dangerous by applying the factors of RESTATEMENT § 520. For example, any high degree of risk of harm, or any likelihood that such harm will be great, would result from the use, not the marketing as such, of handguns. Finally, were we to hold a manufacturer liable for gun marketing as an abnormally dangerous activity, we would improperly blur 'the distinction between strict liability for selling unreasonably dangerous *products* and strict liability for engaging in ultrahazardous *activities* by making the sale of a product an activity.'We are unwilling to do so.

Id. at 761, citations omitted (quoting *Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200, 1203-05 (7th Cir.1984) (italics in original)). Having received a resolution of this legal issue by the local court of appeals, the United States Court of Appeals for the District of Columbia Circuit affirmed the dismissal of the Complaint. *Delahanty v. Hinckley*, 283 U.S.App. D.C. 384, 900 F.2d 368 (1990).

In *Delahanty,* the plaintiff's allegation focused on the very inexpensive pricing of the "Saturday Night Special" and suggested that this was part of what made the product such a danger to the public. As a practical matter, there is no real difference between alleging that a gun manufacturer or distributor or importer owes a duty to a plaintiff because of its pricing of certain products, or because of its business relationships with other lawful entities within the marketing chain. The factor of distribution structure, like pricing, is only one piece of the overall mosaic of "marketing ." Consequently, the plaintiffs' negligent distribution theory is foreclosed by *Delahanty.*

Based upon the fundamental concept of *stare decisis,* this Court is required to apply *Delahanty.*On the common law negligence claims, this Court is simply not free to do otherwise.

Notably, the plaintiffs seem to rely upon various appellate decisions that recognize common law liability under a theory of negligent marketing, where the product in question (in plaintiffs' words) was "far less dangerous" than firearms. Opp. at 22. *See Hunnings v. Texaco, Inc.,* 29 F.3d 1480, 1483-86 (11th Cir.1994)(mineral spirits manufacturer held liable for injury caused by retailer's negligent sales, where it knew its product was commonly sold in illegal and dangerous manner by retail stores); *Suchomajcz v. Hummel Chem. Co.,* 524 F.2d 19, 24-25 (3rd Cir.1975) (manufacturer could be liable for negligently selling chemical to fireworks kit maker); *Moning v. Alfono,* 400 Mich. 425, 254 N.W.2d 759, 765-66 (Mich.1977) (manufacturer owes duty of due care in making, marketing and distributing sling shots). Plaintiffs seem to suggest that those cases

from other jurisdictions should convince this Court to ignore *Delahanty*.However, those other cases cannot make *Delahanty* disappear.

Even if the ruling in *Delahanty* did not exist, this Court would be compelled to recognize that these three cases cited by the plaintiffs are distinguishable and are not instructive. Each is reviewed as follows.

In *Hunnings,* the United States District Court for the Northern District of Florida dismissed the Complaint under Rule 12(b)(6), where parents of a 22 month-old child sued because the child ingested mineral spirits that were stored in an old milk container, devoid of warnings. This dismissal was reversed by the United States Court of Appeals for the Eleventh Circuit, based upon pre-existing common law principles that facially appeared to apply to the particular defendant. Florida law already recognized that a bulk manufacturer could be found liable for injuries that result where the manufacturer already knows that the "downstream" distributor is not giving adequate warnings about the product to the "end user." *Hunnings, supra,* at 1485 (*citing Tampa Drug Co. v. Wait,* 103 So.2d 603, 607 (Fla.1958)). In that case, the plaintiff specifically had alleged in the Complaint that the manufacturer was aware that its product was being "routinely sold in milk containers at the retail level which lacked adequate warnings as required by law."*Id.* at 1482.Moreover, the sufficiency of the negligence allegation was supported by an existing federal statute that prohibits the introduction of a hazardous substance into interstate commerce "in a reused food container." *Id.* at 1482;15 U.S.C. §

1263(f). These statutory supports for the existence of a legal duty are not present in the instant case.

In *Hunning,* the entire case turned on the requirement of establishing a "duty to warn." Only a breach of that duty could produce a judgment for the plaintiffs. Yet, in *Delahanty,* the Court of Appeals specifically pointed out that there was no "duty to warn" anyone about the dangers of criminal mis-use of guns. *Delahanty, supra,* at 760 (citing the RESTATEMENT (SECOND) OF TORTS, 402A cmt. j). If the defendants herein have no actionable "duty to warn" anyone about the dangers of firearms, they certainly have no duty to keep firearms out of the hands of criminals or negligent persons who somehow "mis-use" a weapon.

In *Suchomajcz,* a group of minors (through their parents and fiduciaries) filed suit against certain manufacturers of chemicals that were used as components of fireworks. The children had been injured or killed which such components were sold to them in "fireworks assembly kits." *Suchomajcz, supra,* at 22.Their lawsuit was based on theories of common law negligence, as well as strict liability. The suit was initially dismissed. The dismissal was reversed because the Complaint had fairly articulated a factual issue that could only be resolved by a jury. The factual issue, in a nutshell, was the manufacturer's relationship with its customer (which fabricated and sold the kits to children). In the instant case, there is no jury-triable issue about whether the plaintiffs and defendants had a "pre-existing relationship."

The third case cited by the plaintiffs is inapposite to the present lawsuit. In *Moning,* a child sued a playmate who hit him in the eye with a slingshot. The plaintiff also sued the manufacturer, retailer, and the wholesaler of the slingshot. This particular case proceeded to trial, and the trial court directed a verdict in favor of the corporate defendants. This ruling was reversed because the evidence produced a factual question that could only be answered by a jury. The factual dispute was whether these particular defendants (who directly marketed slingshots to children) created an "unreasonable" risk of harm. *Id.* at 762.The alleged risk created by the defendants was their *purposeful* decision to market these items to children. The issue in *Moning* was not a question about sufficiency of the Complaint itself. Rather, it was a fact-driven issue to be decided by a jury of "reasonable persons being of different minds."*Id.* at 762.

By recognizing the significance of *Delahanty* and other District of Columbia case law, this Court need not dwell further upon the issue of lack of legal duty. Naturally, where there is no duty, there can be no breach of duty that would be the foundation for liability. Nonetheless, it is important to note that appellate case law has developed around the Nation, finding fault with the kinds of pleadings that are the same as those filed herein. In those cases also, Complaints have been dismissed (or dismissals upheld) for the very same reasons argued by the defendants herein. Briefly, this Court will summarize that developing body of case law.

The key state decisions that most vividly support granting the defendants Motion for Judgment on the

Pleadings are: *Merrill v. Navegar, Inc.*, 26 Cal.4th 465, 110 Cal.Rptr.2d 370, 28 P.3d 116 (Cal.2001), *Hamilton v. Beretta, U.S .A. Corp.*, 96 N.Y.2d 222, 727 N.Y.S.2d 7, 750 N.E.2d 1055 (N.Y.2001), and *Penelas v. Arms Technology, Inc.*, 778 So.2d 1042 (Fla.Dist.Ct.App.2001).

The federal appellate decision that is consistent with this Court's own view of the legal duty issue is *City of Philadelphia v.. Beretta, U.S.A. Corp.*, 277 F.3d 415 (3rd Cir.2002).

The most instructive appellate opinion of all, in this Court's view, is found in the decision of the New York Court of Appeals in *Hamilton v. Beretta.*The history of that case, the nature of the allegations, and the development of the appellate result are all worthy of in-depth discussion.

The litigation in *Hamilton* began as a lawsuit in the United States District Court for the Eastern District of New York, filed by two persons (who were relatives of people killed with handguns) suing a large group of manufacturers, on theories of negligent marketing, design defect, conducting ultrahzardous activity, and fraud. The United States District Court eventually dismissed the fraud and product liability claims, but allowed trial to commence on a negligent marketing theory.[9] More plaintiffs joined the case. After much procedural litigation over personal jurisdiction and other issues,

---

[9] *See Hamilton v. Accu-Tek,* 935 F.Supp. 1307, 1315 (E.D.N.Y.1996).

the remaining plaintiffs voluntarily withdrew their claims against distributors, and proceeded to trial only against the manufacturers.

When seven plaintiffs finally went to trial against 25 defendants, their allegations were analogous to those in the instant Complaint. The Second Circuit summarized the character of the allegations:

Plaintiffs asserted that defendants distributed their products negligently so as to create and bolster an illegal underground market in handguns, one that furnished weapons to minors and to criminals involved in the shootings that precipitated this suit. Plaintiffs offered evidence tending to show that defendants' actions contributed to the development and expansion of a huge illegal market for guns, and that this illegal market enabled their criminal misuse.

Plaintiffs further contended that defendants' duty to exercise reasonable care in the marketing and distribution of handguns arose from four factors: (1) their ability to control the marketing and distribution of their guns; (2) their knowledge that large numbers of the guns they manufacture enter the illegal market and are used to commit crimes; (3) New York's policy of strict regulation of firearms; and (4) the uniquely lethal nature of defendants' products.

Hamilton v. Beretta U.S.A. Corp., 222 F.3d 36, 40 (2nd Cir.2000). This theory of liability is a virtual carbon copy of the plaintiffs' allegations in the instant case.

After four weeks of trial, the jury in *Hamilton* returned a verdict in favor of some defendants and against others. Eventually, the jury awarded money damages only against three of the defendants. *Id.* at 40-41.Those three defendants appealed to the United States Court of Appeals for the Second Circuit. The Circuit then certified to the highest court of New York (the New York Court of Appeals) two questions: (1) whether defendants owed the plaintiffs a duty to exercise reasonable care in the marketing and distribution of the handguns they manufacture; and (2) whether liability in this case may be apportioned on a market share basis, and if so, how? The responses to both questions resulted in a favorable ruling for the defendants, when the United States Court of Appeals for the Second Circuit accepted the certified legal determinations of the New York Court of Appeals. *See Hamilton v. Beretta U.S.A., Corp.*, 264 F.3d 21 (2nd Cir.2000). The judgments against the three defendants were vacated, with instructions to the trial court to dismiss the cases. *Id.* at 32.

New York's highest appellate court, in responding to the certified questions, carefully noted the underlying factual allegations in *Hamilton*, stating, "According to plaintiffs, handguns move into the underground market in New York through several well-known and documented means including straw purchases ... sales at gun shows, misuse of Federal firearms licenses and sales by non-stocking dealers." *Hamilton v. Beretta, supra*, 727 N.Y.S.2d 7, 750 N.E.2d at 1059-60.

The New York Court of Appeals held that the defendants owed no common law duty to relatives of victims of crime on a theory of negligent marketing

and that application of a theory of "market share" liability was improper. *Id.* at 1066, 1068.

The keystone of this appellate holding as to common law negligence is the cautious examination of the realistic roots of "legal duty." The Court reasoned that "judicial resistance to the expansion of duty grows out of practical concerns both about potentially limitless liability and about the unfairness of imposing liability for the acts of another." *Id.* at 1061.Legal duty, as the Court emphasized, arises where a defendant's actual relationship with either the tortfeasor or the plaintiff finds "the defendant in the best position to protect against the risk of harm. In addition, the specter of limitless liability is not present because the class of potential plaintiffs to whom the duty is owed is circumscribed by the relationship."*Id.* The most useful example, as the Court pointed out, is the duty of a landowner to protect tenants and invitees-but only as to harm that would occur on the owner's premises-not elsewhere. *Id.* In the present case, the class of potential plaintiffs certainly cannot be "circumscribed by the relationship."

Using the landowner analogy, the New York Court of Appeals concluded that it could find no duty from gun manufacturers to the general public, as a landowner has no duty to "the millions of individuals who use the sidewalks of New York City each day and are thereby exposed to the dangers of street crime."*Id.*[10] Similarly, the New York Court of

---

[10] The Court relied upon a prior ruling that the owner of a housing project who failed to keep door locks in good repair did not owe a duty to a passerby to protect her from being dragged off the street into the building and

Appeals observed that the connection between defendants, the criminal wrongdoers and plaintiffs is remote, running through several links in a chain consisting of at least the manufacturer, the federally licensed distributor or wholesaler, and the first retailer. The chain most often includes numerous subsequent legal purchasers or even a thief.
Id. at 1062.The Court concluded,

Such broad liability, potentially encompassing all gunshot crime victims, should not be imposed without a more tangible showing that defendants were a direct link in the causal chain that resulted in plaintiffs' injuries, and that defendants were realistically in a position to prevent the wrongs. Giving plaintiffs' evidence the benefit of every favorable inference, they have not shown that the gun used to harm plaintiff [ ] came from a source amenable to the exercise of any duty of care that plaintiffs would impose upon defendant manufacturers.

Id. Similarly, the plaintiffs herein do not purport to be able to link their discrete injuries or deaths to a particular weapon that came from any one defendant.

This particular articulation of the lack of a legal duty is especially relevant to the case before this Court. This is because the plaintiffs' case rests on the notion that the defendants' legal duty arises because of acts of persons who are pure interlopers (*i .e.* criminals) with no role in the normal marketing

---

assaulted. *Waters v. New York City Hous. Auth.*, 69 N.Y.2d 225, 513 N.Y.S.2d 356, 505 N.E.2d 922 (N.Y.1987).

journey between a manufacturer, importer or distributor and a legitimate purchaser.[11]

Most importantly, the New York Court of Appeals warned of the impropriety of expanding the concept of "foreseeability" to create a duty that does not otherwise already exist. The Court stated, "Foreseeability, alone, does not define duty-it merely determines the scope of the duty once it is determined to exist."*Id.* at 1060.This concept is especially valuable in the instant case, because plaintiffs contend that violent crime using defendants' products is "foreseeable" by the defendants.

In short, the negligence allegation in *Hamilton* and the one in the instant case are basically mirror images of each other. Just as the allegations in *Hamilton* were found facially insufficient as a matter of law, the claim in the present case also should be dismissed.

Merrill v. Navigar, Inc. illustrates another interesting scenario in which the attempt to pursue a common law negligence theory failed. In *Merrill,* there was a unique interplay between a pre-existing statute that precluded the use of "product liability"

---

[11] The New York Court of Appeals paused to add that it was "neither feasible nor appropriate" for a court to impose upon gun manufacturers the duty to investigate so-called "downstream" local retailers merely on the basis of "trace requests" made by the Bureau of Alcohol, Tobacco and Firearms. *Id.* at 1065, 513 N.Y.S.2d 356, 505 N.E.2d 922. This is the province of law enforcement agencies.

allegations against gun manufacturers and the plaintiffs' effort to use creative pleading to avoid the reach of that law. The California legislature had enacted a prohibition on suing gun manufacturers for damages caused by gun violence, where such lawsuits are based upon an allegation of defective products. The statute, by all accounts, would have precluded a suit based upon allegations of negligent advertising, negligent marketing, etc. The plaintiffs in *Merrill* made a coy attempt to disavow reliance upon allegations that might have been worded like those herein. Instead, they articulated the tort as a "negligent" decision to market one particular weapon to the general public. *Merrill, supra,* 110 Cal.Rptr.2d 370, 28 P.3d at 131 n. 7. The plaintiffs focused on the marketing of a weapon known as a "Tec9."

The Supreme Court of California concluded that the novel choice of words in the pleading was a rather transparent mask for a lawsuit that was precluded by legislated public policy. What is important is the California Court's emphasis that gun manufacturers simply owed no sweeping duty to prevent gun violence or to conform business operations so as to minimize or prevent gun violence. *Id.* at 126-128.

The Supreme Court of California ruled that the unusual lawsuit filed in that case did not pass muster under the equivalent of Rule 12(b)(6) because by the nature of the allegations, taken as true, the California Code precluded the maintenance of the lawsuit altogether. *Id.* at 131.

To be sure, the instant case is not controlled by any District of Columbia statute that would preclude

the common law negligence count. However, the existing common law of California firmly recognized the need to establish both duty and causation in a common law negligence action, and the statute in question merely refined the limits of duty, *Id.* at 123-124, eliminating a potential claim of duty in certain types of cases. The California Code provision that was addressed in *Merrill* was merely designed to preclude certain litigation without regard to whether common law duty could have been established. Consequently, where ordinary tort duty is concerned, the real value of the decision and analysis in *Merrill* is that California's common law remains no different than the common law of the District of Columbia. As the California Supreme Court noted, one of the objectives of the legislature was (in its own words) "to 'stop at birth' the notion that manufacturers and dealers are liable in products liability to victims of handgun usage."*Id.* at 127.

The ruling in *Merrill* is useful because it reflects another facet of appellate court rejection of this type of litigation, however cleverly the allegations might be framed. The lesson of *Merrill* is that novel labeling of negligence allegations will not shroud the real issue.

A Florida appellate court last year also affirmed the dismissal of a case analogous to the instant litigation. *Penelas v. Arms Tech., Inc., supra.*In that decision, the principal issues were whether the plaintiff had sufficiently pleaded an allegation of negligent distribution of firearms, public nuisance, etc. Just as plaintiffs have sought injunctive relief in the instant case, the plaintiffs in *Penelas* sought injunctive relief in addition to money damages. In

part, they sought the issuance of an injunction that would require certain firearms manufacturers and retailers "to implement life-saving features into their products, and to alter the method of firearm distribution and sale so as to better keep firearms out of criminal circulation."*Id.* at 1044.All the claims were dismissed, and certain conclusions of the appellate court are highly instructive.

First, as to negligence, the Court of Appeal of Florida for the Third Circuit quickly rejected the whole negligence theory, for a reason that is much like the application of *Delahanty* in our own jurisdiction. In Florida, there was already an appellate ruling that precluded the filing of a decedent's lawsuit against the seller, manufacturer, etc. of a weapon known as a "riot and combat" shotgun.

The appellate court determined that no negligence claim could be maintained, in part because neither the manufacturer nor distributor had a duty to prevent the sale of handguns to persons who are likely to cause harm to the public [and that] there was no duty which had been breached by the manufacturer and distributor so as to support a cause of action based on negligence. *Trespalacios v. Valor Corp. of Fla.*, 486 So.2d 649, 651 (Fla.Dist.Ct.App.1986).

The appellate court in *Penelas* rejected the viability of any public nuisance claim, for the same reasons articulated by this Court herein. *See* discussion of Count III *infra*.

In *City of Philadelphia v. Beretta,* the United States Court of Appeals for the Third Circuit affirmed the dismissal of a lawsuit in which the municipality sued various gun manufacturers for costs incurred from criminal use of handguns. Much like the allegations in the instant Complaint, the contentions of the plaintiffs in *City of Philadelphia* were that fourteen out-of-state gun manufacturers, though in compliance with federal and state laws, allowed guns to fall into the hands of criminals and children, contributing to criminal use within that city. *City of Philadelphia, supra,* at 419.The theories of liability in that case were negligence, negligent entrustment, and public nuisance.

As to the common law theories, the Third Circuit found that under Pennsylvania law there is no common law duty of the manufacturer of a non-defective firearm to control the distribution of that product to the general public. Moreover, there is no common law duty of a "remote vender" for marketing its product to people who arguably should have been known to the vendor as those who would mis-use the product. *Id.* at 425, citing *Mazillo v. Banks,* No. 3742-C of 1984, 1987 WL 754879, at *2 (Pa.Ct.Com.Pl. Feb. 6, 1987), *aff'd,* 373 Pa.Super. 646, 536 A.2d 833 (Pa.Super.Ct.1987).

The Third Circuit also recognized that in Pennsylvania, a defendant has no duty to control the misconduct of third parties. *Id.* at 426, 536 A.2d 833, citing *Camden County Bd. of Chosen Freeholders v.*

Beretta, 273 F.3d 536, 541 (3d Cir.2001) (hereinafter "Camden County").[12]

This Court has looked closely at one particular appellate case cited by the plaintiffs in their attempt to illustrate that there is a duty existing between defendants and plaintiffs in the case before this Court. The opinion is that of the Supreme Court of Ohio in *City of Cincinnati v. Beretta U.S.A. Corp.*, 95 Ohio St.3d 416, 768 N.E.2d 1136 (Ohio 2002) (hereinafter "*City of Cincinnati*"). That case deserves detailed scrutiny, not only on the issue of the existence of a common law duty, but also on the issue of whether plaintiffs' injuries are so remote from defendants' activities that the plaintiffs lack standing to sue. See further discussion, *infra*, as to the remoteness issue.

In *City of Cincinnati*, the allegations made by the municipality were virtually the same as those asserted by the District of Columbia. The city's Complaint was filed against 15 handgun manufacturers, three trade associations, and one handgun distributor. The theories of liability alleged included nuisance, negligence, and product liability, among others. The Supreme Court of Ohio summarized the key allegations:

The gist of the complaint is that appellees have manufactured, marketed, and distributed their firearms in ways that ensure the widespread

---

[12] This case is also cited herein in this Court's discussion of the allegation of "public nuisance." The Circuit's analysis of the remoteness problem is also valuable and is cited elsewhere herein, *infra*.

accessibility of the firearms to prohibited users, including children and criminals. Thus, the complaint asserts, due to their intentional and negligent conduct and their failure to make guns safer, appellees have fostered the criminal misuse of firearms, helped sustain the illegal firearms market in Cincinnati, and have created a public nuisance. In its complaint, appellant sought both injunctive relief and monetary damages, including reimbursement for expenses such as increased police, emergency, health, and corrections costs. *Id.* at 1140.

The trial court granted the defendants' Motion to Dismiss, pursuant to the local analog of Rule 12(b)(6), and the dismissal was upheld by the Court of Appeals for Hamilton County, Ohio. The Supreme Court of Ohio examined each of the three causes of action before them: public nuisance, negligence, and product liability. Reversing the intermediate appellate court, the Supreme Court of Ohio concluded that all three causes of action had been pleaded with requisite sufficiency in the Complaint.

The premise for reversing the dismissal of the negligence claim was a strained instance of discarding well established common law with no discernable explanation for doing so. The plaintiffs deserve to know why this Court cannot rely upon it. In this Court's view, the Ohio Court's opinion rests on an unexplained conclusion.

The Supreme Court of Ohio, while acknowledging that the common law requires the existence of a duty to the plaintiff by the particular defendant, inexplicably declared that the issue of duty somehow was not relevant. The Court of Appeals had relied

upon longstanding case law that imposed the requirement of a special relationship between a plaintiff and a defendant in order to find a legal duty. The principal cases were *Gelbman v. Second National Bank of Warren*, 9 Ohio St.3d 77, 458 N.E.2d 1262 (Ohio 1984) and *Simpson v. Big Bear Stores Co.*, 73 Ohio St.3d 130, 652 N.E.2d 702 (Ohio 1995). Nonetheless, the Supreme Court of Ohio stated:

> The court of appeals misconstrued the nature of appellant's negligence claims and erred in relying on the above authorities to dismiss those claims for lack of duty. In both *Gelbman* and *Simpson*, the issue before this court was whether, based on their status as property owners, the defendants owed a duty to protect persons such as business invitees from negligence or criminal acts of third parties that occur outside the owner's property and beyond the owner's control. In contrast, the negligence issue before us is not whether appellees owe appellant a duty to control the conduct of third parties. Instead, the issue is whether appellees are themselves negligent by manufacturing, marketing, and distributing firearms in a way that creates an illegal firearms market that results in foreseeable injury. Consequently, the 'special relationship' rule is not determinative of the issue presented here. Instead, the allegations of the complaint are to be addressed without resort to that rule. *Id.* at 1144, 652 N.E.2d 702.

The above-quoted passage is the Court's entire explanation as to why the negligence count should have survived dismissal. Yet, it reveals no justification as to why the "special relationship rule"

suddenly is not relevant to particular defendants in the firearms industry. The reasoning in the above-quoted opinion, at best, only raises more questions than it answers. It is completely discordant with *Gelman* and *Simpson* while leaving those holdings intact. It creates doubt and confusion where clarity should reign.

As a practical matter, there is no real difference between a duty to prevent harm to a plaintiff and duty to avoid conduct that causes the same harm. These are all iterations of the same thing. Even where negligence has occurred, there can be no liability in the absence of a duty that, in turn, is founded upon a special relationship between plaintiff and defendant. This is exactly why the clear lack of a legal duty should preclude the wasteful process of attempting to prove that the defendant in question was engaging in negligent conduct. Remoteness generally means that a putative plaintiff is too far along a chain of alleged causation to be one to whom a duty is owed and whose injury is foreseeable. It is a doctrine designed to limit liability.

The Ohio opinion is an elegant example of ignoring that "a duty and the corresponding liability it imposes do *not* rise from mere foreseeability of the harm."*Hamilton v. Beretta, supra,* at 1062 (emphasis in original). The decision in *City of Cincinnati* is an aberration from the mainstream of jurisprudence on this important subject.

This Court is independently convinced that the content of the Complaint herein, on its face, does not sufficiently allege a legal duty of these defendants towards any of the plaintiffs.

*2. Remoteness and Lack of Legally Sufficient Pleadings.*Defendants assert that the conduct described in the Complaint is based upon factual transactions inherently so remote from the injuries inside the District that the plaintiffs cannot establish any act or failure to act of the defendants as a proximate cause of their respective injuries. This is a different way of articulating a problem that is recognized by another name, *i.e.* lack of standing. Without having standing to sue, there is no set of facts under which the plaintiffs can establish liability as a matter of law.

The most helpful and relevant case from another jurisdictions is *Ganim v. Smith & Wesson Corp.*, 258 Conn. 313, 780 A.2d 98 (Conn.2001), involving a lawsuit very similar to this case. Within the District of Columbia, a recent decision from the United States Court of Appeals for the District of Columbia Circuit reaches the same conclusion on the "remoteness" issue. That decision is found in *Service Employees International. Union Health and Welfare Fund v. Philip Morris, Inc.*, 346 U.S.App.D.C. 74, 249 F.3d 1068,*cert. denied*, 534 U.S.994 (2001) (hereinafter "Service Employees"). Although it relates to the tobacco industry rather than the firearms industry, the reasoning in *Service Employees* is instructive and can be applied with equal force to suits against either industry. These cases deserve great weight. However, to gain the benefit of these two cases, it is essential to recapitulate a useful definition of the remoteness issue, as it relates to the sufficient pleading of a cause of action. The Supreme Court of the United States provides such a definition in *Holmes v.*

Securities Investor Protection Corp., 503 U.S. 258, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992).

In *Holmes*, the Supreme Court held that the doctrine of remoteness provides that "a plaintiff who complains of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover."*Id.* at 268-69.The problem of remoteness is related to the issue of whether a plaintiff can ever establish proximate cause (which is a fundamental element of any common law negligence claim). The Supreme Court has emphasized that "proximate cause" is a generic label for "the judicial tools used to limit a person's responsibility for the consequences of that person's own acts."*Id.* at 268 (citations omitted)."Accordingly, among the many shapes this concept took at common law was a demand for some direct relation between the injury asserted and the injurious conduct alleged."*Id.*

The United States Court of Appeals for the Third Circuit has observed,

Remoteness is analyzed through the following six factors: (1) the causal connection between the defendant's wrongdoing and the plaintiff's harm; (2) the specific intent of the defendant to harm the plaintiff; (3) the nature of the plaintiff's alleged injury and whether it relates to the purposes of tort law; (4) whether the claim for damages is highly speculative; (5) the directness or indirectness of the alleged injury; and (6) the aim of keeping the scope of complex trials within judicially manageable limits, i.e., avoiding the risks of duplicative recoveries and

the danger of complex apportionment. *City of Philadelphia, supra,* at 423.

In *City of Philadelphia* and *Ganim,* allegations of the kind contained in the instant Complaint were found to be clearly and fatally remote. The disposition in *Service Employees* illustrates a similar defect in the pleading of the same kinds of allegations against companies in the tobacco industry.

In *City of Philadelphia,* where there were also individual plaintiffs, the Third Circuit found that the District Court had correctly and justifiably identified the very same kinds of remoteness defects that this Court finds are present in the instant Complaint. The Circuit stated,

In its analysis, the district court examined the route a gun takes from the manufacturer to Philadelphia streets, finding it 'long and tortuous.' First, the defendant manufacturers sell guns to licensees; second, the licensees sell the guns to dealers; third, the dealer sells it to a lawful purchaser acting as a straw buyer; fourth, the straw buyer transfers the weapon to a criminal or a youth; fifth, the transferee uses the gun to commit a crime, or the youth injures himself or a companion; and finally, demand on the City's or the organizational plaintiffs' resources is increased. *Id.* at 423 (citation omitted).

The appellate panel added, "the straw's dealings are not with the manufacturers. Moreover, straw purchases are not the only means by which guns allegedly reach the 'illegal market,' and the chain is

likely much longer and more varied."*Id.* at 424 (footnote omitted).

The United States District Court in *City of Philadelphia* had observed that the plaintiffs (like those herein) did not claim that the gun manufacturers intended to inflict injury upon the citizens, but that, at most, "they allege awareness of the means by which prohibited purchasers end up possessing handguns."*Id.*

One of the contentions of the plaintiffs herein is that the defendants should be on notice of illegal use of their weapons because of "trace requests." However, the United States Court of Appeals noted that "trace request information does not inform law enforcement agencies that a particular licensed distributor or dealer has committed an illegal act. Consequently, the trace request information does not put a gun manufacturer on notice that a specific distributor or dealer is engaged in unlawful firearm trafficking."*Id.* at n. 14.

With regard to the speculative nature of damages, and its relation to remoteness, this Court is convinced, as was the Third Circuit in *City of Philadelphia,* that plaintiffs' damages are speculative because "it would be difficult to calculate how many incidents could have been avoided had the [defendants] adopted different policies. Moreover, as the district court noted, 'for each individual injury, independent factors obviously come into play, such as criminal conduct, drug or alcohol abuse, or other misconduct by the owner.' " *Id.* at 425, quoting *City of Philadelphia v. Beretta, U.S.A. Corp.,* 126

F.Supp.2d 882, 905 (E.D.Pa.2000) (citation and internal quotations omitted).

Finally, another remoteness factor in *City of Philadelphia* is just as compelling in the instant case: plaintiffs do not purport to be able to link a particular defendant with specific injuries or municipal costs. Since the plaintiffs seek to hold all defendants liable in gross, "any effort to compensate plaintiffs would require the expenditure of enomous judicial resources to determine which defendants should bear what percentage of liability."*Id.*[13] In the present case, it is fair to say that the Superior Court of the District of Columbia has no greater resources than the local federal court in the Eastern District of Pennsylvania. The plaintiffs have said nothing to raise a challenge to this particular factor. Indeed, they ignore it. The treatment of the remoteness/standing issue by the Courts in deciding *Ganim* and *Service Employees* is equally instructive.

In *Ganim*, the plaintiffs were not individual citizens, but rather the Mayor of the City of Bridgeport (Joseph Ganim) and the municipality itself. They sued various firearms manufacturers, trade associations, and retail sellers. The plaintiffs sought injunctive relief as well as money damages for expenses of police services, emergency services, police pension benefits, health care, social services, etc. *Ganim, supra,* 780 A.2d at 108. The Supreme

---

[13] This point is also relevant to the analysis of the plaintiff's theory of determining and apportioning damages, as pleaded in Count V (collective liability). See further discussion, *infra* in text, as to Count V.

Court of Connecticut affirmed the dismissal of the entire lawsuit, for lack of standing.

While some of the claims in *Ganim* are not included in the instant Complaint (such as negligent design of weapons), many of the *Ganim* claims were similar to those at hand. For example, they included an allegation that the defendants had sold large numbers of handguns to individual buyers, and permitted "straw" purchases when they knew or should have known that the handguns were intended for an unauthorized user." *Id.* at 111.They linked such sales to "a significant source of handguns used for criminal activity in Bridgeport."*Id.* They alleged that the manufacturers "are aware of the retailers' irresponsible and illegal conduct, and have not taken sufficient measures, if any, to prevent it."*Id.* The Court will not pause further to repeat the details of all the allegations in the Complaint. It suffices to say that the lawsuit was of the same, basic nature at the Complaint herein.

The basis for the dismissal clearly was the lack of standing, due to the remoteness of the claims. The Supreme Court of Connecticut focused on applying the *Holmes* factors to the types of claims in the instant case. It cited a good, three-part synthesis of the *Holmes* factors, articulated more recently by the United States Court of Appeals for the Second Circuit in *Laborers Local 17 Health & Benefit Fund v. Phillip Morris, Inc.*, 191 F.3d 229 (2nd Cir.1999), *cert. denied,*428 U.S. 1080 (2000) (hereinafter "Laborers Local 17".) Those three elements are summarized as follows.

The more indirect an injury is, the more difficult it becomes to determine the amount of plaintiff's damages attributable to the wrongdoing as opposed to other, independent factors. Second, recognizing claims by the indirectly injured would require courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, in order to avoid the risk of multiple recoveries. Third, struggling with the first two problems is unnecessary where there are directly injured parties who can remedy the harm without these attendant problems. *Id.* at 236-37.

As to the first factor, the Supreme Court of Connecticut was constrained to note the obvious as to the inherent indirectness of the claimed injuries. It stated:

> It cannot be denied that factors other than the defendants' manufacture, advertisement, distribution and retail sales of guns contribute in significant measure to the various harms claimed by the plaintiffs. The scourge of illegal drugs, poverty, illiteracy, inadequacies in the public educational system, the birth rates of unmarried teenagers, the disintegration of family relationships, the decades long trend of the middle class moving from city to suburb, the decades long movement of industry from the northeast 'rust belt' to the south and southwest, the swings of the national and state economies, the upward track of health costs generally, both at a state and national level, unemployment, and even the construction of the national

> interstate highway system, to name a few, reasonably may be regarded as contributing to ... [the city's] quality of urban life.

Ganim, supra, at 124.

Except for the reference to the "rust belt," the societal ills described above are found just as readily in the District of Columbia.

As to the second element, *i.e.* the virtual impossibility of fairly apportioning damages, the Court observed that the whole process of apportionment "would present a daunting question to any court."*Id.* at 126.Furthermore, in suits that might be filed by other potential individual plaintiffs such as homeowners or families of those injured by gunfire, "the defendants would be entitled to assert various special defenses, based on those plaintiffs' conduct, which would not be available to the defendants in the present action. Thus, failing to recognize the derivative nature of the present action could unfairly deprive the defendants of those defenses."*Id.* at 126.In the instant case, as brought by the District, this creates a natural tension between a suit brought by the municipality and yet-unfiled lawsuits by individuals.

The third factor illuminates an interesting issue emerging from the impact of gun violence. The Supreme Court of Connecticut noted the argument of the plaintiffs that "they have standing because there are instances where the injuries for which they seek redress occur even without an individual victim, for example, where they incur the costs of detection,

investigation, arrest and social services 'handling cases of unlawful gun possession in which not a single shot is fired.'We are not persuaded."*Id.* at 127.

The Court in *Ganim* was not persuaded because it plainly recognized that the true impetus for filing the Complaint was the enormity of countless killings and negative impact on the lifestyles of children, as alleged in Bridgeport's Complaint.

In *Services Employees,* the United States Court of Appeals for the District of Columbia Circuit affirmed the dismissal of a suit by certain institutional plaintiffs against various tobacco companies. In that case, the defendants were sued by several "labor-management health trust funds" (hereinafter "funds"). They were joined by a number of sovereign nations such as Guatamala, based upon the costs that they incurred to fund health care for their citizens.

The United States District Court had dismissed the claims of the nations, concluding that "the 'tortured path' from the defendants' alleged wrongdoing to the nations' increased expenditures 'demonstrates that [the nations'] claims are precisely the type of indirect claims that the proximate cause requirement is intended to weed out.'" *Service Employees, supra,* at 76, 249 F.3d at 1071, quoting *Republic of Guatamala v. Tobacco Inst., Inc.,* 83 F.Supp.2d 125, 130 (D.D.C.1999). However, the United States District Court denied the motion to dismiss filed against the funds. On appeal, the dismissal against the nations was affirmed and the denial of the motion to dismiss as to the funds was reversed.

Specifically addressing what should have been a dismissal of the claims brought by the funds, the Court of Appeals found that "the harms alleged by the funds and the nations are too remote from the defendants' alleged wrongdoing to provide antitrust or RICO standing. Neither the funds nor the nations have shown that their claimed economic harms were not caused by other independent factors or that difficult problems of duplicative recoveries or allocation of damages could be avoided were they allowed to proceed."*Id.* at 81, 249 F.3d at 1074. The *Holmes* factors were cited and explained in the context of tobacco use. Moreover, the panel noted that since the claims did not set forth facts from which proximate cause could be articulated, any local common law claims must fail as well as the federal statutory claims. *Id.* at 83,239 F.3d at 1076.

Even though the suit by the funds was manifestly not a subrogation action, the District of Columbia Circuit concluded that no claim had been sufficiently pleaded as a so-called "infrastructure" harm. The Court reasoned that any "harm arising from payment of medical expenses by the funds and the nations is itself derivative of alleged injuries to individual smokers."*Id.* at 81, 249 F.3d at 1074. This concept certainly applies to the District's claim herein.

While the present litigation has unfolded, the number of federal circuits rejecting similar suits against tobacco companies has increased. *See Lyons v. Philip Morris, Inc.*, 225 F.3d 909 (8th Cir.2000); *United Food & Commercial Workers Unions v. Philip Morris, Inc.*, 223 F.3d 1271 (11th Cir.2000). Those

lawsuits failed also because of the remoteness problem. This was the identical fate of a tobacco lawsuit dismissed by the Hon. Steffen W. Graae in the Superior Court of the District of Columbia. *See Obra Social de Empleados de la Marina Mercante, et al. v. American Tobacco Co., Inc., et al.*, Civil Action No. 00-1790 (D.C. Super Ct. Jan. 2, 2001).

Finally, with respect to the negligence claims of the individual plaintiffs in the instant case, there is no need to expound at length on the problem of lack of proximate cause. Not one of the individual plaintiffs has stated his or her claim in such a way as to identify a particular defendant as being responsible for his or her injury or death. No plaintiff can prevail in a lawsuit against a group of defendants by essentially throwing a dart at the group and never making an assertion that any one of them was connected to the injury.

The relevant case law that governs the role of proximate cause is more than enough to compel the dismissal of the claims as to common law negligence as to all plaintiffs and all defendants.

Count III: Common Law Public Nuisance

Count III of the Complaint is brought solely by the District of Columbia. The District demands damages from all the defendants under a theory that they have created a "public nuisance."

Fundamentally, defendants argue that they are entitled to a judgment in their favor at this early stage of the litigation because the nuisance claim, on its face, does not fall within any of the established

categories of tortious conduct that are recognized in this jurisdiction as a "public nuisance."

The District of Columbia Court of Appeals has synthesized the basic difference between a private nuisance and a public nuisance.

A *public nuisance* is an unreasonable interference with a right common to the general public. At common law, the term 'public nuisance' covered a variety of *minor* criminal offenses that interfered, for example, with the public health, safety, morals, peace, or convenience....

In contrast, a private nuisance is a substantial and unreasonable interference with private use and enjoyment of one's land, for example, by interfering with the physical condition of the land, disturbing the comfort of its occupants, or threatening future injury or disturbance. Historically, the origin of private nuisance liability 'was purely tortious in character,' not criminal; and the tort was developed, as needed, to protect use and enjoyment of land against nontrespassory interference. *B & W Mgmt., Inc. v. Tasea Inv. Co.,* 451 A.2d 879, 881-882 (D.C.1982) (emphasis added).

The historical genesis of "public nuisance" law is set forth in encyclopedic fashion in the familiar treatise known as the [RESTATEMENT (SECOND) OF TORTS], § 821B, cmt. a (1979). In the treatise, the definition of common law public nuisance is consistent with the definition quoted in *B & W Management, Inc., supra.*

In the modern era, most jurisdictions have updated their recognition of this legal theory, to require it to conform to specific statutes. In one commentator's observation, the law of public nuisance simply "ha[d] become anachronistic" because it ran contrary to the values of precision and certainty. *Id.* cmt. c. The need for precision and certainty, in fixing liability and money damages, is utterly essential to fundamental fairness and the orderly litigation of economic disputes.

The abatement of public nuisances is firmly a creature of statute, and does not come from judicial fiat. In the District of Columbia, the legal authority for imposing the remedy of "abatement" of a public nuisance comes from only two sources: (1) the general Code provision that relates to the city's duty to ameliorate illegal conditions arising from real property; and (2) specific nuisance abatement language in criminal statutes, taxation statutes, or other explicit regulatory schemes. These statutes apply to many forms of "abatement" that may be carried out with respect to both real property and personal property. This lawsuit is about a claim for reimbursement of the costs of nuisance abatements. The notion of seeking "reimbursement" for the costs of abatement is actually quite limited, and this is reflected in the following description of the nuisance laws of the District.

First, the Executive Branch has responsibility for regulation and inspection of myriad uses of real property, where public health and safety are concerned. The Code provides a basic authorization to the Mayor "to correct any condition which exists on or has arisen from such property in violation of

law or of any regulation made by authority of law, with the correction of which condition said owner is by law or by said regulation chargeable...."D.C.Code § 6-711.01(a) (2001) [redesignated as D.C.Code § 42-3131.01(a) (2002)]. The reference to "such property" specifically means "real property in the District of Columbia."*Id.*

Where it is necessary for the Mayor to take action to eliminate the particular nuisance, the Mayor is authorized to do so and to "assess the fair market value of the correction of the condition or the actual cost of the correction, whichever is higher, and all expenses incident thereto ... as a tax against the property ..."*Id.*Thus, the Code envisions that the way for the District to obtain "reimbursement" for the cost of such abatement is through taxation, not lawsuits for money damages.

The Court of Appeals has ruled that the same statute provides authority to the Mayor to enforce compliance with valid regulatory orders that are not necessarily reflective of a traditionally defined "public nuisance," but which violate discrete legal requirements or which breach clear legal authority to engage in certain activity. *Auger v. Board of Appeals & Review,* 477 A.2d 196, 211 (D.C.1984). This would include, for example, a property owner's refusal to remove a sign after a sign permit has been revoked. *Id.*

Certain statutes are directed towards activity that the Legislative Branch has deemed specifically to be a public nuisance. The best example is the use of real property for offensive and illicit sexual activity for commercial purposes, *e.g.* operating a so-

called "bawdy house." Indeed, the Court of Appeals has commented that the bawdy house statute captures the essence of a "nuisance per se." *Raleigh v. United States*, 351 A.2d, 510, 514 (D.C.1976).

Secondly, there are myriad other criminal and regulatory laws that give the Mayor authority to engage in the abatement of illegal activity, including forfeiture of money and forfeiture of a broad range of personal property. Some examples are: (1) authorization to the Mayor to file actions for "libel" to obtain forfeiture of fixtures and furniture and the like where a property owner is operating a "gambling premises" (D.C.Code § 22-1705(c) (2001)); (2) seizure of alcoholic beverages where they are illegally sold or consumed (D.C.Code § 25-803 (2001)); (3) confiscation of motor vehicle fuels where applicable taxes have not been paid (D.C.Code § 47-2320(b) (2001)). Where abatement of illegal activity relates to personal property rather than realty, the same geographic stricture is invoked, *i.e.* the affected personalty and the offending activity must be found *within* the District of Columbia.

One principle is crystal clear: all provisions of the Code described above set forth a specific delineation of the police powers of the Mayor with respect to public nuisances that affect the health and safety of the citizens. These police power statutes plainly do not authorize the Mayor to abate nuisances or illegal activity that is occurring outside the geographical boundaries of the District of Columbia. Yet, in seeking "reimbursement" damages, this is precisely what the plaintiffs presume can be ordered by the Superior Court. They are wrong. This is a glaring flaw in Count III of the Complaint. Moreover, the

territorial limitation on the Mayor's police powers is a factor that obviously dovetails into the Commerce Clause problem that infects the Assault Weapons Strict Liabirity Act. See further discussion, *infra,* as to the constitutional problems in the Strict Liability Act.

Interestingly, the Strict Liability Act does not in any fashion authorize the Mayor to engage in any seizures, forfeitures or other forms of abatement activity (whether or not such matters might be attempted inside or outside the District). Furthermore, the Act does not provide for any type of injunctive relief. The only relief authorized by the Act is money damages. Thus, the Strict Liability Act clearly cannot be a basis for suits for reimbursement of abatement expenses.

The common law of the District of Columbia has never permitted judicial orders of abatement to be formulated or concocted by judges on an *ad hoc* basis, in the absence of a statute that expressly grants such authority to the courts. In opposing the instant Motion for Judgment on the Pleadings, the plaintiffs have not pointed to any statute that contains authority to sue based on the alleged public nuisance described in the Complaint. None exists.

To summarize, the action for "public nuisance" as alleged by the District is not sustainable as a matter of law, for several reasons.

First, it is not based upon conduct of the defendants that violates any criminal law of the District of Columbia. The District readily acknowledges that

none of the extraterritorial operations of the defendant companies constitute criminal conduct.

Second, none of the defendants' conduct violates any municipal regulation or health and safety law of the District of Columbia (such as the tax laws, zoning regulations, or anything else). There is, for example, no allegation in the Complaint that the defendants have violated any law that regulates the use of real property or personal property within the District of Columbia. This is conceded. Consequently, this Count of the Complaint presents no cause of action for "abatement" that could be founded upon any regulatory statute.

Third, the whole notion of demanding damages in the form of reimbursement for the cost of "abatement" work is legally groundless. The District should have known this when it filed the Complaint, because it is so obvious that the Mayor and his subordinates have no police powers that would enable them to engage in any "abatement" efforts outside of the District of Columbia. The District would never incur any costs of "abating" the organization of gun shows in Wyoming or inspecting or shutting down retail outlets in Virginia, for example. The suggestion in Count III that there is actually some form of "abatement" that can be executed by the District outside this city is totally illusory. For this reason, no damages for reimbursement for "abatement" could ever be part of any judgment against the defendants.

The United States Court of Appeals for the Third Circuit has rendered thoughtful opinions that identify the practicalities of why the lawful activities

of these defendants cannot be properly categorized as a public nuisance. Those opinions emerge in *Camden County, supra,* and *City of Philadelphia, supra.*

The key point in both cases is that the defendants do not have control over the criminals who used or misused their products. Having some recognizable ability to control the alleged nuisance is an essential element to a suit for abatement. Affirming the dismissal of a lawsuit much like this one, the Third Circuit wrote,

The county makes no allegation that any manufacturer violated any federal or state statute or regulation governing the manufacture and distribution of firearms, and no direct link is alleged between any manufacturer and any specific criminal act.... Whatever the precise scope of public nuisance law in New Jersey may be, no New Jersey court has ever allowed a public nuisance claim to proceed against manufacturers for lawful products that are lawfully placed in the stream of commerce. On the contrary, the courts have enforced the boundary between the well-developed body of product liability law and public nuisance law. Otherwise, if public nuisance law were permitted to encompass product liability, nuisance law 'would become a monster that would devour in one gulp the entire law of tort.'

Camden County, supra, at 539-540, quoting *Tioga Pub. Sch. Dist. v. U.S. Gypsum Co.,* 984 F.2d 915, 921 (8th Cir.1993).

In *Camden County,* the panel observed the nub of the problem in pleading the claim. Referring to the

chain between the defendants and victims of crime, it noted,

This causal chain is simply too attenuated to attribute sufficient control to the manufacturers to make out a public nuisance claim.... The manufacturers may not be held responsible 'without a more tangible showing that the defendants were a direct link [in] [*sic*] the causal chain that resulted in the plaintiffs' injuries, and that the defendants were realistically in a position to prevent the wrongs.' *Camden County, supra,* at 541, quoting *Hamilton v. Beretta U.S.A. Corp., supra* 727 N.Y.S.2d 7, 750 N.E.2d at 1062. Recognizing that the real cause of the "nuisance" is individual street crime rather than the lawful activities of the defendants, the Third Circuit emphasized, "If independent third parties cause the nuisance, parties that have not controlled or created the nuisance are not liable."*Camden County, supra,* at 541.

In *City of Philadelphia,* a case nearly identical to the instant lawsuit, the Complaint had been dismissed for failure to sufficiently plead a similar public nuisance claim and other claims. That dismissal was affirmed as well, relying on the precedent and reasoning of *Camden County.*

In other jurisdictions, public nuisance suits against the gun industry have failed as well, for reasons similar to those articulated in *Camden County.*This was the result, for example, in *Penelas v. Arms Technology, Inc.,* 778 So.2d 1042 (Fla.App.2001).

This Court has carefully reviewed the cases cited by the plaintiffs in support of their nuisance claim. They are not an effective answer to the principles that undergird *Camden County* and other authorities. For example, the denial of a motion to dismiss a public nuisance claim was affirmed in *Young v. Bryco Arms*, 327 Ill.App.3d 948, 262 Ill.Dec. 175, 765 N.E.2d 1 (Ill.App.2001). That case, too, was a suit against companies such as the defendants herein, alleging public nuisance and other causes of action. The affirmance is of no relevance to the instant case, because it was completely idiosyncratic to an Illinois statute.

In *Young*, the plaintiffs complained that they were authorized to file suit to vindicate their "public right to use the streets and other public places within the City of Chicago without fear, apprehension and undue risk of injury to themselves or to their families."*Id.* at 4. The Illinois appellate court decided that the allegation had been pleaded sufficiently only because of an 1888 case that found an actionable right flowing from a "village ordinance [that] declared public picnics and open air dances to be a public nuisance."*Id.* at 18.These kinds of gatherings of juveniles had been the sites of drive-by shootings that were described in the Complaint. Under these highly unique circumstances, the pleading was found to be legally sufficient. There is no such case law in the District of Columbia. Thus, this particular case is not instructive at all.

Finally, giving the Complaint the broadest possible reading, it may be that the District simply misuses the term "abatement" to signify an attempt to obtain compensatory damages for the City's "costs"

arising from the alleged nuisance (costs such as those associated with maintaining police and fire protection, for example). If so, this is no more than an improper attempt to obtain money under the rubric of the health-care and personnel statutes without complying with the requirements of pleading such claims. Since this Court finds elsewhere herein that the District's Complaint does not state a claim that facially satisfies those requirements as to the subrogated claims, the District cannot do indirectly (through the nuisance claim) what it cannot do directly.

Count I: The Strict Liability Act and the Specific Claims for Damages

Defendants seek a judgment on the pleadings with respect to Count I, for reasons that are entirely separate from the constitutional challenge as such. First, the defendants argue that the individual plaintiffs have insufficiently pleaded their claims. Secondly, the defendants assert that the District is not authorized by law to file its own claims for damages under this particular statute. The Court addresses both arguments separately as follows.

1. *The Individual Claim of Lawson.* This particular plaintiff asserts that as a result of gunshot wounds he was severely injured and that he suffers permanent disabilities. He alleges that he was shot and paralyzed in Northeast Washington, D.C. on January 26, 1997 and that two persons eventually entered guilty pleas in connection with this incident. Complaint at ¶¶ 43, 45. He required surgery in January of 1997 and in April of 1997. Complaint at ¶ 46. He further alleges,

> *During surgery for his injuries,* two bullets were recovered from Plaintiff Lawson; the bullets were determined to be *either .380 or 9 millimeter caliber.*These bullets *most likely* were fired by a 'machine gun,' as defined by the Strict Liability Act, which was manufactured, imported, or sold by one of the Defendants.

Complaint at ¶ 47 (emphasis added).

The defendants argue that Lawson's claim, as it is worded, fails to articulate a claim against any one of the defendants. Defendants essentially argue that it is so vague that it could not support a judgment against any one defendant, even if the claim is true on its face.

The Court concludes as a matter of law that Lawson's claim is not legally sufficient on its face. This is so for several reasons (some of which apply to the other individual plaintiffs as well). First, since the injuries to this plaintiff occurred so long ago, there is no excuse for his inability to assert which defendant's weapon was used to harm him, if this fact is knowable at all. Surely, the defendants would not know this information, and it would not be revealed in discovery. See further discussion, *infra,* as to discovery. Secondly, Lawson fails to allege that he was injured by the discharge of a named weapon that is actually covered by the Strict Liability Act.

The Court has considered the arguments tendered by Lawson and the District as to why Lawson's claim should withstand the instant Motion

for Judgment on the Pleadings. Those arguments have no merit.

The plaintiffs make no secret of the fact that Lawson is unable to identify the weapon that was used to injure him, that the weapon was never recovered, and that he is unable to identify which of the named defendants manufactured, imported or sold such weapon. In other words, Lawson's claim, as it is pleaded, does not connect his injuries to any particular defendant and does not allege that he was injured by a gun made, imported, or distributed by any one of them. If he had sued only one defendant, it is clear that he could not obtain a judgment against that entity without identifying allegations. Therefore, his pleaded claim is not made legally sufficient merely because it is magnified by a larger number of defendants whose actual connection to the shooting is equally unstated in the Complaint.

The inherent and glaring flaw in Lawson's allegation is that he and the District, *not the defendants,* are in the best position to identify the relevant weapon and the particular defendant whose product was involved, if such facts can be ascertained. Lawson has simply failed to plead his claim so as to draw a simple link between his injuries and a weapon banned under the Strict Liability Act. This is crucial to establishing liability.

The defendants cite an opinion from the District of Columbia Court of Appeals holding that common law tort principles do require a plaintiff to plead a causal link between an identifiable product and an identifiable defendant. *Bly v. Tri-Continental Indus., Inc.,* 663 A.2d 1232, 1237 (D.C.1995). The Strict

Liability Act, while eliminating the concept of "fault" from the analysis, does not in any way eliminate a plaintiff's obligation to be specific about the identity of the firearm and the identity of the manufacturer, importer, or seller who is responsible for the particular weapon.

Interestingly, the invocation of the Strict Liability Act not only requires a plaintiff to specify that the weapon involved was one covered by the Act, but that this particular weapon was manufactured, distributed, or imported by a company that is actually one of the named defendants. The plaintiffs do not contend that these defendants are the only possible sources of those weapons banned under the Act.

If anything, the whole point of invoking strict liability is to hold liable those entities whose temporal (*i.e.* timely and physical) connection to the injury is not really open to question. Strict liability, exactly as the phrase implies, is founded upon strict pleading, not conjecture or mere generalities.

Without being able to name a specific weapon that was used, it is, by definition, impossible for Lawson to show that the relevant weapon was one covered by the Act itself. For this reason, Lawson's claim must fail as a matter of law.

The decision in *Bly* deserves further comment. In *Bly*, the Personal Representatives of several deceased persons sued various manufacturers and suppliers of gasoline, alleging negligence, strict liability and other causes of action. They sought to make those defendants legally responsible for the

deaths of the decedents from leukemia, which they asserted was contracted from exposure to benzene contained in gasoline. *Id.* at 1234.The defendants in *Bly* had filed Motions for Summary Judgment and Motions to Dismiss. *Id.* at 1235.All defense motions were granted, and all such rulings were affirmed by the Court of Appeals.

The principal issues on appeal in *Bly* were (1) whether the trial court had erred in granting judgment for the defendants whose connection to the gasoline exposure concededly could never be proven by the plaintiffs, and (2) whether the trial court erred in disallowing the use of an alternative theory of liability where it was impossible to identify the defendant whose product was responsible for the injury (the so-called "market share liability" theory). The Court of Appeals found that the allegations in *Bly* did not support the invocation of this "radical departure from traditional tort law principles...."*Id.* at 1234.See further discussion, *infra*, regarding "collective liability."

The plaintiffs in the instant case seek support from *Bly* because of suggestions therein to the fact that the parties had engaged in discovery before the critical lack of evidence had been confirmed. *Id.* at 1234-35.In *Bly*, the appellate court stated,

After extensive identification discovery, appellants do not contend that they have any evidence that they were exposed to Marathon's products. Thus, dismissal was clearly appropriate under tort law principles which require proof that the product alleged to have caused a plaintiff's injury can be traced to the manufacturer. *Id.* at 1242, citing

District of Columbia v. Freeman, 477 A.2d 713, 716 (D.C.1984); *Catrett v. Johns-Manville Sales Corp.*, 263 U.S.App.D.C. 399, 406, 826 F.2d 33, 40 (1987). Unlike what evolved in *Bly*, the instant case presents no need for the parties to engage in discovery in order to "confirm" the lack of evidence.

The plaintiffs argue that "Mr. Lawson is entitled to discovery to identify the manufacturer of the gun with which he was shot and to determine with certainty that it was an "assault weapon" or "machine gun" covered by the Strict Liability Act. Opposition at 57. This quoted statement is an unmistakable admission that Lawson has failed to allege what kind of weapon was used to injure him or which defendant is associated with such a weapon. He (and the District) had no clue about this information when the Complaint was filed. Even after this issue was flagged to his attention by the instant Motion for Judgment on the Pleadings, Lawson has proffered nothing to cure the problem and has never sought to amend his allegation, so as to be more specific.

The troubling flaw in the plaintiffs' argument is that since no weapon was actually recovered in the Lawson shooting-a fact that is conceded in Lawson's reference to "probability"-there is no "discovery" from the defendants that will produce the necessary identifying information about the relevant weapon.

Ironically, when compared to the defendants, it is Lawson and the District of Columbia who have exclusive knowledge of whatever facts might reveal the identity of the weapon, and they still do not know such information. After all, the District of Columbia

government includes the Metropolitan Police Department and all its professional contacts with law enforcement agencies. If that Department or any other law enforcement agency had actually recovered a weapon, the weapon could be compared to the ammunition that was recovered and the mystery might be solved (as the type of weapon, date of manufacture, etc.).

The defendants surely have no access to the weapons that were physically associated with the claims of Lawson and the District. The plaintiffs do not ever frivolously suggest that the defendants could produce such evidence. Therefore, the reference to taking discovery is an empty statement, and it seeks to evade the real problem in this case: no deposition, interrogatory, etc. will produce the kind of information that the plaintiffs should have had in their possession before they filed this lawsuit.

On product identification and defendant identification, the factual record is already as highly developed as it will ever be as to Lawson's claim. This claim has been pleaded with as much specificity as it will ever have.

It is important to note also that neither the District nor Lawson has ever suggested that they could identify "the Lawson weapon" or its manufacturer based solely on the type of ammunition that was used in the shooting. They do not claim that the ammunition that was recovered is so unique that the mere recovery of such a bullet or shell casing could pinpoint its source (or the vintage of the source).

The problem of a failure to allege that any identified defendant was the source of the gun that injured the plaintiff is one that arises with respect to *all* the other individual claims in this case, including those embraced in the proposed Third Amended Complaint. No individual plaintiff purports to know (or purports to be able to find out) which particular weapon caused the injury or which defendant (if any) was its manufacturer or distributor. No amount of discovery from the defendants will improve the quality of the claims as they were pleaded in the Complaint, nor can such discovery yield proof of these claims. The plaintiffs have utterly failed to confront this very practical fact of life.

The claim by Lawson under the Act requires some kind of identifier of the "vintage" of the weapon, so as to place Lawson's injury within the time coverage of the Act.[14] The plaintiffs already acknowledge in the Complaint that the only weapons covered by the Act are those that a defendant actually manufactured, imported or sold after one of two relevant dates. As Lawson's claim is pleaded, it does not assert that the weapon involved was manufactured, sold or distributed after the relevant effective dates of the Strict Liability Act and the statute that added the inclusion of machine guns. In the Complaint, the plaintiffs allege,

---

[14] Even without specifying the actual date itself, Lawson should at least state under oath in a Verified Complaint that the weapon used to injure him was in fact manufactured, imported or sold after the relevant effective date. He has failed to make this claim, even in a conclusory fashion.

> Each of the defendants has manufactured, imported, or sold one or more assault weapons (as defined by the Strict Liability Act) *after February 29, 1992, the effective date of the Act,* or one or more machine guns (as defined by the Act) *after October 7, 1994, the date the Act became applicable to machine guns.*D.C.Code §§ 6-2391 to-2393. One or more of these assault weapons and machine guns have been discharged in the District, thereby causing deaths and bodily injuries.

Complaint at ¶ 75 (emphasis added).

Despite this sweeping, but preliminary kind of statement about what the defendants generally have done, Lawson stops short of actually saying that any statutorily enumerated assault weapon or machine gun of the relevant age of manufacture (or importing or sale) was used to injure him. The above-quoted statement is no more than a generalized allegation that these defendants manufactured or distributed these kinds of weapons during these time periods, and that such weapons were discharged in the District thereby injuring unnamed persons. Even assuming that the quoted statement is true, it does not suffice as a properly pleaded claim for damages.

For example, Lawson does not allege that the particular weapon used to injure him was one of the enumerated "assault weapons" or that it was one manufactured, imported, or sold by one of the named defendants at some point after the effective date of February 29, 1992. Where machine guns are concerned, Lawson does not even hint at, much less

specify, that he was shot with a machine gun of some kind rather than one of the specifically named assault weapons. Consequently, he fails to plead with requisite specificity that he was injured with a machine gun that was manufactured, imported or sold by one of the defendants at some time after the date of October 7, 1994.

The effective dates of the Act are so specific that any plaintiff has a clear obligation to plead facts that, on their face, would make the Act applicable. The statute itself provides the fundamental standard by which to measure the sufficiency of pleading. Neither Lawson nor the District attempts to explain this failure of pleading.

Plaintiffs' only other argument for the sufficiency of Lawson's claim is the sweeping statement that "Lawson is entitled to hold Defendants collectively liable for his injuries if the defendant that manufactured the gun used to shoot him cannot [be]specifically identified."Opposition at 55. This "collective liability" argument has no merit for the reasons set forth herein in more detail, *infra,* with respect to the Court's analysis of Count V.

*2. Other Individual Claims.*The Court's review of the other individual claims reveals that they all carry the very same kinds of defects that burden the claim of Lawson. For the sake of brevity, the Court will not repeat the wording of their claims again. It suffices to say that the other individual plaintiffs likewise fail to identify which defendant and corresponding product was involved in their respective injury or death of the relevant decedent. They likewise fail to allege that the weapon involved

was in fact manufactured after the effective date of the Strict Liability Act.

Because *none* of the individual plaintiffs bases his or her case on weapons that were actually recovered, their claims are pled on pure speculation. Mahoney, for example, can only say that the gun utilized was a machine gun "or" an assault weapon, and he certainly is unable to plead that the weapon (whatever it was) was manufactured, imported, etc. after the effective date of the Act. The same problem is found in the pleading of the Foster-els. Thus, they cannot establish any facts by which they can obtain a judgment against the defendants. To summarize, the Court's analysis of the deficiencies of the Lawson claim applies equally to the other individual plaintiffs and is incorporated herein by reference.

The claims of the individual plaintiffs added in the Third Amended Complaint also are legally insufficient. For example, the claims of Wallace and Marsh are based on conjecture. The best that they can articulate is, "On information and belief, the bullets that killed Wallace and Marsh were fired by a 'machine gun' or "assault weapon' as those terms are defined by the Strict Liability Act. The gun was manufactured, imported, or sold by Defendants."Third Amended Complaint at ¶ 87.

First, using the phrase "on information and belief' is really no different than awson's phrase that the bullets were "most likely" fired by a weapon covered by the Act. Second, these plaintiffs recite only in conclusory fashion that the gun was "manufactured, imported, or sold by Defendants."Yet, since the weapon that caused the

deaths was not recovered, by definition the plaintiffs cannot trace its year of manufacture, the date of import (if indeed it was made outside the United States), or the date of sale.

The claims of Ferguson, Vaughn, and Blue present a variation of the weapon identification problem previously considered with respect to Lawson's claim. While they state, in purely conclusory terms, that the weapon involved was explicitly an "AK-47," they fail to state that it was an AK-47 that was manufactured, imported or sold after the effective date of the Act. This is not nit picking, because legislation applies to a particular defendant only as of its effective date unless the Act itself contains a retroactivity clause. This statute contains no such clause. Thus, even if they had stated in the Third Amended Complaint that an eyewitness could testify that the weapon was an AK-47, this kind of visual recollection cannot account for the precise information that the plaintiffs would have to produce in order to establish a prima facie case.

3. The District's Claim.

The District of Columbia seeks monetary damages under the Strict Liability Act under two different approaches: (1) a totally independent claim of its own and (2) claims made pursuant to specific subrogation statutes, wherein other individuals are the actual victims of the allegedly tortious conduct. The defendants challenge the sufficiency of the claim, under every rubric used by the District.

The sufficiency of the pleading of the District's claim is attacked on several fronts. First and

foremost, the defendants argue that the Strict Liability Act, by its own terms, is limited to civil actions that are to be filed by individuals. They stress that Act itself does not grant a separate right of action to the District.

Secondly, to the extent that the District seeks money damages for common law or equitable reasons under Count I, the defendants cite well-established case law that precludes the District from filing such lawsuits for the broad purpose of "municipal cost recovery."

Third, the defendants contend that the pleading of a claim under color of the subrogation statutes is legally insufficient because the District has failed to allege adequate information about the underlying claims that belong to the individual persons who received the medical care or other benefits for the personal injuries. For example, the defendants cite the fact that the District's claim fails to identify the names of the persons who are the actual subrogors and further fails to recite the identity and vintage of the weapon so as to reveal why the incident is covered by the Strict Liability Act. There are other fatal flaws as well. See further discussion, *infra*, under "Count IV: Subrogated Claims Under Public Reimbursement Statutes."

Fourth, the defendants argue that the District's attempt to obtain reimbursement for systemic costs associated with generalized gun violence is not a legally cognizable claim under the Act, because not all "gun violence" is caused by the very specific weapons covered by the Strict Liability Act itself.

Two of the points noted above are examined further as follows.

No Separate Right of Action Under the Strict Liability Act. In the Complaint, the District alleges the following:

> Defendants are strictly liable to Plaintiff District for (1) health care costs and Medicaid expenses the District has incurred for care and treatment of victims of this gun violence and (2) costs of other assistance and compensation provided or paid by the District to police officers, firefighters, and other District employees who have suffered injuries from this gun violence, which costs are recoverable under District statutes. D.C.Code §§ 1-624.31, 3-502, and 4-502. Defendants also are liable for *any other costs* incurred by the District that are recoverable by statute, in equity, or under common law.

Complaint at ¶ 78 (emphasis added).

Contending that the Act, by its terms, applies only to suits filed by individuals, defendants urge the Court to look first to the plain words of the Act. In pertinent part, the Act provides:

Any manufacturer, importer or dealer of assault weapons and machine guns shall be held strictly liable in tort, without regard to fault or proof of defect, for all direct and consequential damages that arise from bodily injury or death if *the bodily injury or death* proximately results from the discharge of the assault weapon or machine gun in the District ...

This section shall not operate to limit in scope any cause of action, other than that provided by this subchapter, available to *a person injured* by an assault weapon. D.C.Code §§ 6-2392, 6-2393(c) (emphasis added). The statute is totally devoid of any mention of a separate right to sue for the District of Columbia.

Aside from the facial lack of authority to sue, the defendants point out that the lack of a right to sue as a corporation is self-evident from the language specifying that the damages must be those that flow from personal injury, *i.e.* that the District is not a human being that can sustain such injuries.

To be sure, the Act's references to "bodily injury" and to "persons," are not ambiguous. Only an individual human being is a "person" who can experience bodily injury or death. "The words of a statute should be construed according to their ordinary sense and with the meaning commonly attributed to them." *Peoples Drug Stores, Inc. v. District of Columbia,* 470 A.2d 751, 753 (D.C.1983). Moreover, as the District of Columbia Court of Appeals has observed, "The text of an enactment is the primary source for determining its drafters' intent." *Stevenson v. District of Columbia Bd. Of Elections & Ethics,* 683 A.2d 1371, 1376 (D.C.1996).

The words of the Act are so clear that it is not necessary for this Court to review the legislative history in order to determine whether the Council actually meant to create a right to sue only in individuals. *Id.* Nonetheless, the defendants have cited ample portions of the legislative history,

wherein various members of the Council of the District of Columbia expressed a desire to provide a right to action to *individual* citizens. *See* Defendants' Memorandum in Support of Motion for Judgment on the Pleadings at 26. In response to the instant Motion, the plaintiffs cite no other legislative history to suggest in any way that the Council intended to enact a separate right of action for the District of Columbia under the Strict Liability Act. To avoid extending this opinion, the Court will not pause to recreate the legislative history of the Act.

The District struggles to explain the legal basis for filing its own lawsuit under the Strict Liability Act. In its Opposition to the Motion for Judgment on the Pleadings, the District states:

> The Strict Liability Act is a remedial statute. In construing an act with a broad remedial purpose, the District of Columbia courts give a liberal interpretation to the protective provisions of the act, while narrowly construing the exemptions and exceptions to the act. In this case, as a result of deaths and bodily injuries in the District of Columbia caused by Defendants' assault weapons and machine guns, the District had incurred direct and consequential damages, in the form of Medicaid *and other* health care costs; costs of *other assistance and compensation* provided or paid to police officers, firefighters, and other District employees; and others [sic] costs recoverable by statute, *in equity, or under common law. Accordingly, the District may bring a direct*

> *claim for relief under the Strict Liability Act.*

Opposition at 11 (emphasis added).

The second sentence in ¶ 78 of the Complaint is telling, when juxtaposed with the quoted arguments in the District's Opposition. In ¶ 78, the District alleges that defendants may be sued under the three health care statutes, but that defendants "also are liable for any other costs incurred by the District that are recoverable by statute, in equity or under common law."It is clear from the way this portion of the Complaint is worded that the District hinges its right to sue on two different theories: use of the subrogation statutes that are explicitly cited, as well as a vague concept of "equity" and "common law," as if such principles can alter and expand the provisions of a specific piece of legislation.

Illogically, the District attempts to blend two utterly different sources of law, by asserting that a statutory right to sue somehow emerges from unspecified "common law." The District cites no authority for this kind of statutory construction, and none exists. Reduced to its essence, the District's contention as to why the Court should recognize a separate right to sue is nothing more than a request that the Court engage in legislating. This would be totally improper.

When the instant statute was enacted, the Council created a very new kind of statute, in an effort to deal with a problem that seemed intractable. The Council clearly could have included a separate right of action for the District if it had desired to do

so. This did not happen. It is not the business of the Superior Court to re-write a statute. In all the years since the enactment of this law, no one has used it until now-and the Council has not taken any steps to broaden it or amend it for any reason. The Court has no power to tinker with the statute in order to boost the merits of one party's position over another.

In this context, it is important to recall the very important principle that guides every trial court engaged in statutory construction. The Court of Appeals has observed that the legislature "is presumed to have been aware of existing statutes" when laws are enacted on the same subject matter. *United States v. Willie Brown*, 422 A.2d 1281, 1284 (D.C.1980). The Council knew, when it enacted the Strict Liability Act, that the Code contained several pre-existing subrogation statutes to regulate the litigation relationship between the District, its employees, and its citizens. Consequently, since the Act itself does not grant the District an independent right to sue, this is not presumed to be an accident or innocent omission, since the basic subject of how the District can pursue the claims of others is already subject to statutory strictures. The Court thus concludes that the facial lack of language granting the District its own right to sue was a choice.

The District asserts another argument in support of its assertion that the Act affords a separate right to sue for the District. In its Opposition, the District asserts that it has a separate right of action based upon the Act's reference to "direct and consequential damages that arise from bodily injury or death."D.C.Code § 7-2551.02. This argument is

extremely weak. The District totally mis-applies that legal term of art.

The use of the phrase "direct and consequential damages" is not by any means a reference to the District as a separate, putative claimant of "consequential damages." Rather, it is nothing more than a common statutory reference to damages that are traditionally included in civil actions for all types of personal injury, where secondary types of damage are traceable to the original injury itself. *See, e.g. Bogen v. Green,* 239 A.2d 154 (D.C.1968)(finding that a proper form of "consequential damages" for injury from an automobile collision could include loss of rental income due to inability of the plaintiff to continue work as a landlord). The concept of consequential damages is also seen, for example, where appellate courts permit a plaintiff to recover for personal injuries that flow from a breach of warranty. *See Payne v.. Soft Sheen Prods., Inc.,* 486 A.2d 712, 719 (D.C.1985).

Classically, the term "consequential damages" means those losses or injuries "which are a result of an act but are not direct and immediate."BLACK'S LAW DICTIONARY, 352 (5th ed.1979). Where consequential damages are concerned, such damages relate to the same plaintiff and this terminology has no connection to creating rights to sue by third parties that are not the same persons who were injured by the predicate tort.

The Bar to Municipal Cost Recovery. Defendants argue that the District's claim under Count I includes not only the health care reimbursement issue, but a much broader assertion that the Strict

Liability Act is the basis for seeking damages for unspecified "costs of other assistance and compensation."The District, in its Opposition, does not hide the fact that it is seeking broad cost recovery for providing law enforcement and other municipal services that are somehow associated with "gun violence" and are not related specifically to anyone's personal injuries. *See* Opposition at 11. To the extent that the District's claim goes beyond the field of health care reimbursement via subrogation, the attempt to obtain damages that cover appropriated funds for generalized law enforcement are plainly not within the ambit of "personal injuries." Even if the District did have an independent right of action to obtain reimbursement for the cost of funding medical care for "personal injuries," this amorphous aspect of the claim would not be covered by the Act.

Furthermore, the defendants cite an important local appellate opinion that is squarely on point as to the bar to generalized municipal cost recovery. This is the federal decision in *District of Columbia v. Air Florida, Inc.*, 243 U.S.App.D.C. 1, 750 F.2d 1077 (1984). In *Air Florida,* the District sued that airline in tort, alleging entitlement to damages for the costs of "emergency and cleanup expenses" incurred as a result of a plane that crashed into the 14 th Street Bridge in 1982. The expenses were alleged to be "in excess of three-quarters of a million dollars, in rescuing survivors, recovering bodies of the deceased, and raising the airplane and its contents from the river."*Id.* at 3,750 F.2d at 1979 (footnote omitted).

The District Court's dismissal of that lawsuit pursuant to Rule 12(b)(6) was affirmed by the United

States Court of Appeals for the District of Columbia Circuit. The panel observed,

> The general common-law rule in force in other jurisdictions provides that, absent authorizing legislation, 'the cost of public services for protection from fire or safety hazards is to be borne by the public as a whole, not assessed against the tortfeasor whose negligence creates the need for the service.'We think that the Ninth Circuit, *in City of Flagstaff v. Atchison, Topeka and Santa Fe Railway Co.*, has offered a persuasive rationale for this common-law rule, and we adopt both their reasoning and the rule here. Where emergency services are provided by the government and the costs are spread by taxes, the tortfeasor does not anticipate a demand for reimbursement. Although settled expectations must sometimes be disregarded when new tort doctrines are needed to remedy an inequitable allocation of risks and costs, where a generally fair system for spreading the costs of accidents is already in effect-as it is here through assessing taxpayers the expense of emergency services-we do not find that argument for judicial adjustment of liability to be compelling. *Id.* at 4, 750 F.2d at 1080 (footnotes omitted).[15]

FN15.

The United States Court of Appeals pointedly explained, "We are especially reluctant to reallocate risks where a governmental entity is the injured party. It is critically important to recognize that the government's decision to provide tax-supported

---

[15] *See City of Flagstaff v. Atchison, Topeka and Santa Fe Ry. Co.*, 719 F.2d 322 (9th Cir.1983).

services is a legislative policy determination. It is not the place of the courts to modify such decisions."*Id.*

Leaving aside the District's attempt to avail itself of the subrogation statutes, it is certainly clear that the Strict Liability Act on its face does not authorize the District to sue for the costs of emergency public services, or to pursue damages for any type of municipal costs, whether they stem from medical care or purchasing police gear.

This Court has looked closely at the District's argument on the subject of municipal cost recovery. The most that the District can say is that "the District's direct cause of action for damages under the Health-Care Act and Police and Firefighters Act, and other damages it is authorized to recover under the Strict Liability Act, cannot be defeated by the common-law prohibition against recovery or governmental functions."Opposition at 19. This argument is wide of the mark in two respects. First, the Strict Liability Act grants no separate right of action to the District for any type of lawsuit. The District's tactic of merely reciting that it does is wasteful and unhelpful. Secondly, the District's reliance upon the Health-Care Act and the Police and Firefighters Act is subject to the terms of those particular laws, and the requirements for sufficiency of pleading thereunder. This is the problem that the District has dodged altogether. See further discussion, *infra,* regarding "Count IV: Subrogated Claims Under Public Reimbursement Statutes."

Count I: The Strict Liability Act-Constitutional Issues

Defendants attack the sufficiency of the Complaint on constitutional grounds, as well as on grounds of insufficient factual allegations. Ordinarily, courts do not pass upon the constitutionality of legislation if the case can be decided on other grounds, by which the constitutional issue can be avoided. *See United States v. Locke,* 471 U.S. 84, 92, 105 S.Ct. 1785, 85 L.Ed.2d 64 (1985). Because this Court finds that the plaintiffs have failed to sufficiently plead the factual basis for this cause of action, there is technically no need for the Court to decide whether the Strict Liability Act is unconstitutional. However, the parties herein have briefed this issue as an important one and it would be a disservice to the parties to ignore it. For the sake of completeness, then, it is prudent for the Court to set forth how it would interpret the constitutional question if there were no other basis for resolving the Motion for Judgment on the Pleadings.

In short, if there were no other basis on which to adjudicate the legal sufficiency of the claim in Count I, this Court would be compelled to grant the instant motion on constitutional grounds.

To understand why the Strict Liability Act is a legally insufficient basis for this lawsuit, it is important to focus on the nature of the constitutional attack and then to sift through the reasons why the plaintiffs' response is unconvincing. The constitutional problem with this statute is more sophisticated than plaintiffs admit, and they fail to confront the problem for what it is.

The challenge brought by the defendants embraces both the Commerce Clause[16] as well as the Due Process Clause of both the Fifth and Fourteenth Amendments.[17] First, as to the Commerce Clause, defendants' central argument is set forth as follows:

> Implementation of the Strict Liability Act violates the Commerce Clause because the Act does and was meant to restrict commercial behavior beyond the borders of the District of Columbia. One need only look at the words of the Act's sponsor, David Clarke, in introducing the Act's predecessor: '[This legislation] will lead to far few handguns, not only in the district, but *in the nation as a whole.* Memorandum from Clarke to members of D.C. Council Re: Introduction of Strict Liability Legislation (1989)(emphasis added). The Commerce Clause, however, does not allow

---

[16] Article I, Section, Clause 3 of the United States Constitution grants Congress the power to "regulate Commerce with foreign Nations, and among the several States...."

[17] The Fourteenth Amendment does not apply literally to the District of Columbia. It is assumed that the same constitutional protections would be covered by the Fifth Amendment. *Bolling v. Sharpe,* 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954). The Fourteenth Amendment process that no State shall "deprive any person of life, liberty, or property, without due process of law...." The Fifth Amendment provides in pertinent part that no person shall "be deprived of life, liberty, or property without due process of law...."

> the District to foist its policy choices onto other states.

Memorandum in Support of Defendants' Motion for Judgment on the Pleadings at 45 (footnote omitted).

A review of applicable Supreme Court case law on the Commerce Clause yields clear prohibitions against the attempts of local legislatures to regulate commercial activities beyond their borders. Certain cases are directly on point. The United States Supreme Court has held:

> [T]he 'Commerce Clause ... precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, *whether or not the commerce has effects within the State,'* [*Edgar v. MITE Corp.*, 457 U.S. 624, 642-643, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982)] ... The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State ...
>
> [T]he practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory

> regime into the jurisdiction of another State.

Healy v. Beer Inst., Inc., 491 U.S. 324, 336, 109 S.Ct. 2491, 105 L.Ed.2d 275 (1989)(internal citations omitted).

The Supreme Court likewise struck down as unconstitutional a New York statute that required every liquor distiller or producer that sells liquor to wholesalers within the State to sell at a price that was no higher than the lowest price the distiller charged wholesalers anywhere else in the United States. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986). The Court ruled, "While a State may seek lower prices for its consumers, it may not insist that producers or consumers in other States surrender whatever competitive advantages they may possess." *Id.* at 580.

Though the District's Assault Weapon Strict Liability Act is not designed to discretely regulate pricing, etc., it is far broader in its intended reach. It confers strict liability for all damages that flow from the discharge of such weapons inside the District, without regard to any allegation or proof of "fault." This is a constitutional problem of even greater scope than the issue concerning the New York liquor statute. This is because there is no way of avoiding liability under the Act without going out of business altogether or at least implementing a substantial overhaul of the entire set of relationships with suppliers, distributors, etc. Such drastic changes in the structure of the firearms business (even as to only certain classes of weapons) are either not

mandated at all by other jurisdictions (or by the federal government) or are not mandated consistently outside the District.

The allegations of "negligent distribution" in Count II more than explain the breadth of what would be necessary to avoid or even minimize the potential for liability under the Act. To avoid "strict liability," the defendants would have to make nation-wide changes in how they do business, because the most recent geographic source of any illegal assault weapon cannot necessarily be ascertained. Moreover, the passage of a weapon through interstate commerce does not always implicate a direct route between the District and only one other jurisdiction at a time. The statutorily banned weapons could come from literally anywhere.

The Strict Liability Act need not represent a formal "regulatory" scheme to be violative of the Commerce Clause or the Due Process Clause. The use of pro-active lawsuits that are filed pursuant to the Act can also be a strategic method of improperly imposing a jurisdiction's regulatory policy. Making this very point, the Supreme Court has realistically observed, "The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236, 247, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). This is why the plaintiffs herein are mistaken, if not disingenuous, when they contend that "the Act does not enjoin or prohibit the production of assault weapons and machine guns, nor does it attempt to cotrol or to regulate them beyond the borders of the District of Columbia."Plaintiff's Opposition to Defendants'

Motion for Judgment on the Pleadings at 50. The instant lawsuit is a direct attempt to use the Act as a tool of policy enforcement through the collection of money damages.

The response of the plaintiffs to the Commerce Clause challenge focuses primarily on two chief points. One, the plaintiffs argue,

> The Act treats in-state and out-of-state manufacturers and distributors identically.
>
> Where, as here, Defendants cannot show that the Strict Liability Act is discriminatory, the Supreme Court applies a different inquiry, as set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). Under *Pike*, a statute must be upheld if it serves a 'legitimate public interest,' its effects on interstate commerce are only 'incidental,' and the burden imposed on interstate commerce is not 'clearly excessive in relation to the putative local benefits.'*Id.* (citation omitted) (underlining in original).

Opposition at 49. Secondly, plaintiffs broadly contend that "[p]ublic health and safety measures are accorded a "presumption of validity," which must be rebutted by the party challenging the statute."Opposition at 49 n. 27. When both of these arguments are examined closely, they ultimately do not provide adequate support for the plaintiffs.

First, the plaintiffs make only a very weak point when they claim that the Act is non-discriminatory.

To say that in-state and out-of-state industries are not treated differently is an empty contention. There are literally no "in-state" gun manufacturers, importers, or sellers operating inside the District of Columbia. Consequently, it is pointless to justify the Act by stating that it does not erect unfair advantages for "in-state" manufacturers, etc. over their "out-of-state" cohorts. There are no industries within the District that compete with the defendants herein. The manufacture and sale of firearms in the District had been outlawed decades before the Act was ever passed.

The "discrimination" problem is more complicated, because the defendants' products are not subject to any kind of operational regulation in the District of Columbia. Significantly, the Act does not even apply to situations that are not caused by intervening criminal conduct. Thus, out-of-state industries would be subject to massive requirements for changing their business operations only because of District of Columbia law, when other jurisdictions do not impose this kind of expense and regulation. A judgment on the pleadings is appropriate here, because all these points are discernable without the need for any discovery.

Leaving aside the issue of whether the Act is discriminatory, the Act does not even pass muster under the *Pike* analysis. This is easily shown merely by reference to what is contained within the four corners of the Complaint itself. To examine pleading deficiencies as such, it is instructive to view Count I and Count II in juxtaposition to each other. In light of the plaintiffs' own description in Count II of how the "negligent distribution" allegedly occurred and

how it could have been alleviated (and how it occurs), it is obvious that the use of the Act as a basis for litigation cannot possibly have only an "incidental" impact on interstate commerce.[18] The plaintiffs cannot reconcile the concept of "incidental" with the broad kinds of relief that they seek through injunctions, strict liability damages, and what they imply in Count III to be "abatement." Defendants complain bluntly that the only way to avoid liability under the Act is to cease doing business. The position of the defendants on the implications of plaintiffs' lawsuit is not farfetched.

The Due Process challenge to the Act is the contention that the Complaint "likewise violates the guarantee of due process by arbitrarily attempting to impose the District's regulatory scheme beyond its borders."Memorandum in Support of Defendants' Motion for Judgment on the Pleadings at 46. The whole concept of territoriality is at the heart of the due process problem with this Act. Moreover, the territoriality issue compromises the public nuisance allegation in Count III as well. See further discussion, *supra,* as to Count III. This is because the Mayor has no police powers to engage in abatement activity outside the District of Columbia.

There are not large numbers of published appellate opinions on the subject of territorial limits to police powers, because the geographic confines of State police powers are so self-evident. Nonetheless, the District of Columbia Court of Appeals long ago

---

[18] This is only one example of why the various Counts ought not to be viewed out of context with each other. The practical interplay among them is unmistakable.

had occasion to reiterate the concrete limits of local regulatory power. *See Mann v. District of Columbia,* 22 App. D.C. 138 (1903). The facts in *Mann* are illustrative of the territoriality limitations that apply herein.

In *Mann,* the Court of Appeals reviewed the level of enforcement of the District's law that prohibited any person fro n removing a dead animal to a place of disposal that was not authorized by the Commissioners of the District of Columbia. A District citizen was caught transporting his dead horse through the streets of the District-to a factory in Virginia. He was charged with a violation of the District's law because the Virginia site was not an approved disposal facility. He was ultimately exonerated of any liability under the District of Columbia Code. The Court of Appeals explained,

> [The] question in the present case is not difficult of solution; for it is very plain that the commissioners of the District of Columbia are without authority of law to control [an individual] in the disposition which he makes of his property outside of this District.... The regulation cannot be allowed any extraterritorial force ... [and] is not applicable to the individual citizen who removes his property beyond the jurisdiction.

Id. at 146-47.

The United States Supreme Court has also stated that from principles of state sovereignty and comity "a State may not impose economic sanctions on

violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 572, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996).

At best, the plaintiffs only raise two points in an attempt to justify the extraterritorial regulation through the Act and through this litigation. One, they argue that there is no constitutional problem because the Act is one that addresses public safety concerns. The plaintiffs rely, for example, on a Supreme Court case where the Court stated that it could "think of no better example of police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *United States v. Morrison*, 529 U.S. 598, 618, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000). That suppression of violent crime is a solid example of local "police power" is not in dispute. The quotation from *Morrison* is a pithy statement that no one denies[19] The citation to such observations utterly begs the real question.

That public safety is a valid state concern begs the question of whether the United States Constitution permits extraterritorial exercise of such police powers specifically to pursue that particular local interest. It does not-and the plaintiffs cite

---

[19] The opinion in *Morrison* did not involve a constitutional challenge to a State law. Rather, is concerned an attack on a federal statute that provided civil remedies to victims of gender-motivated violence. The Supreme Court ruled that the Commerce Clause did not permit Congress to enact this statute.

absolutely no authority for such an exception. This is the real issue.

Finally, the plaintiffs argue that the cases "are many in which a person acting outside the state may be held responsible according to the law of the state for injurious consequences within it."[20] *Young v. Masci,* 289 U.S. 253, 258-59, 53 S.Ct. 599, 77 L.Ed. 1158 (1933). As support for this principle, the plaintiffs rely on *Young v. Masci.*However, the facts in *Young v. Masci* are distinguishable from the present case.

In a nutshell, *Young v. Masci* involved a Due Process Clause challenge to a New York statute that imposed liability upon every owner of a motor vehicle for personal injuries that result from operation of vehicles driven within New York with permission of the owner. The owner in issue was not a resident of New York. Finding no Due Process Clause violation, the Supreme Court observed that this particular owner brought liability upon himself when he gave the driver permission to take the vehicle across State lines, into New York. The Court stated, "When Young gave permission to drive his car to New York, he subjected himself to the legal consequences imposed by that State upon Balbino's negligent driving as fully as if he had stood in the relation of master to servant. A person who sets in motion in one State the means by which injury is inflicted in another may, consistently with the due process clause, be made liable for that injury whether the

---

[20] *See* Opposition to Defendants Motion for Judgment on the Pleadings at 53.

means employed be a responsible agent or an irresponsible instrument."*Id.* at 258.

Unlike the allegations against the defendants in the instant case, the owner in *Young v. Masci,* intentionally permitted the instrumentality of the damage to cross State lines into New York. That the instrumentality eventually caused damage to others inside of New York was not intended, of course. However, the permission to take it to New York was indeed the intent of the owner.

By contrast, nothing in the Complaint herein alleges that the defendants specifically intended to cause assault weapons or other prohibited weapons to enter the District of Columbia through other jurisdictions. The Supreme Court opinion in *Young* is inapposite. The plaintiffs have inflated its importance far beyond its actual meaning.

Amicus Curiae argues that there is no constitutional defect in the Act, citing a Supreme Court case involving state law affecting the retail automobile industry. *Worldwide Volkswagen Corp. v. Woodson,* 444 U.S. 286 (1980). In that case, the Court stated:

> The forum state does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by the consumers in the forum state.

Id. at 297-98.This case is unhelpful for two reasons. First, it addresses personal jurisdiction, not liability. Second, automobiles are not legislated to be contraband in any part of the United States. This is an important distinction because no firearms can be legally sold or distributed in the District of Columbia. Hence, no defendant herein could expect that its products would be purchased lawfully in the District of Columbia. In *Worldwide,* it was obvious that the expectation of sales was the expectation of lawful sales.

The proverbial "bottom line" is that the invocation of a law aimed at public safety is not, in and of itself, an exception to the requirements of the Due Process Clause. There is no real difference between impermissible extraterritorial regulation that is effectuated through legislation or through the filing of claims for damages.

In other words, the plaintiffs may not obtain from the Judicial Branch an impermissible form of manipulating interstate commerce where such relief cannot be obtained from the Executive Branch or the Legislative Branch. On this principle, the Supreme Court has observed, "State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute."*BMW, supra,* at 573 n. 17.The Court also has said, "It matters not that that law has been applied in a civil action and that it is common law only.... The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised." *New York Times Co. v. Sullivan,* 376 U.S. 254, 265, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

The three Branches of government are coequal. If one Branch is precluded from regulating commerce outside of the District, the others are precluded from doing so as well, through their own respective processes.

Count IV: Subrogated Claims Under Public Reimbursement Statutes

The District's subrogation claims are beset with many pleading deficiencies. The Complaint is oddly organized and worded in a variety of ways.[21] There is an ambiguity as to whether the District relies on the three subrogation statutes as the basis for its right to sue in any of the substantive Counts other than Count I. In either event, the subrogation claims must be dismissed.

1. Facial Deficiencies as to Filing Prerequisites. The District's reliance upon the three subrogation statutes was insufficiently pleaded because facts essential to a claim under any of these statutes are not alleged. Certain missing allegations affect only one statute, but other missing allegations affect all three of them. In a nutshell, the facial deficiencies in the Complaint are: (1) the failure to plead that the District has obtained assignments from specific employees, where required under the Merit Personnel Act and (2) the failure to identify the underlying beneficiaries and the fundamental basis for each such claim under all three of the subrogation statutes. The District, like any other

---

[21] For example, the subrogation statutes are set forth in a separate Count, as if they form a substantive cause of action such as breach of contract, fraud, etc.

subrogee must include in a Complaint the identity of the person whose claim is being asserted, as well as the facts that each such individual claimant would have been required to plead if that person had filed his or her own lawsuit.

It is not sufficient as a matter of law for the District to make a sweeping, categorical claim that unnamed employees or citizens were injured and that the defendants are collectively responsible for injuries that are neither specified nor linked to any particular defendant's product.

As a practical matter, what the District is doing in this Complaint is tantamount to an insurance company filing a subrogation action without even identifying its insured, or without revealing the date or description of the insured's injury. This type of "say-nothing" pleading is unknown in the Superior Court. It would not be permissible in an ordinary collision case that is brought by a subrogee insurance company. The District should not be permitted to do what no other subrogee would be allowed to do. Certain aspects of the pleading deficiencies are illuminated in more detail below.

First, the District seeks damages under the Merit Personnel Act in the form of reimbursement for salaries and benefits of law enforcement personnel and related public employees caused by "gun violence." The District's claims under this particular statute are, on the face of the Complaint, insufficient as a matter of law to support any judgment. The District has not pleaded what the statute specifically requires for recovery under the statute.

The statute itself does not leave such requirements to any guesswork. The Code provides that the District may file suit, for subrogated claims, where the Mayor obtains an "assignment" to the District of the "right of action" of the relevant "beneficiary." D.C.Code § 1-623.31(a)-(b). The statute only authorizes the Mayor to "prosecute or compromise a cause of action "*assigned* to the District of Columbia government." D.C.Code § 1-623.31(c) (emphasis added). This portion of the statute is pivotal, because it references the assignment of rights in the past tense, signaling that the assignment of the right to sue must pre-date the filing of the District's own lawsuit. The District essentially has no defense to this defect in the Complaint. There is no assertion by the District in the Complaint that it has obtained an assignment from any District employee under this statute. For this reason alone, the claims under the Merit Personnel Act must fail, and judgment should be entered in favor of all defendants on this claim.

The issue of obtaining assignments operates differently with respect to claims for Medicaid reimbursement. Under the Health Care Assistance Act, the District's subrogation rights commence "[a]s soon as the District begins providing health-care assistance to *a beneficiary,*" although the Mayor "[a]lternatively, or in addition to the legal subrogation ... may require a beneficiary to execute a written assignment of that same right or claim."D.C.Code § 4-602(b) (2001) (emphasis added). The reference to "a beneficiary" imposes the need to identify the person who qualified for this assistance. An assignment is not a condition precedent to the District's right to sue, although the failure to name

the underlying beneficiaries is still a legal flaw in the Complaint.[22]

Presumably, the District relies upon the Merit Personnel Act as its authorization to file suit as to claims that are beyond those alleged under the Strict Liability Act. Clearly, the Strict Liability Act does not even apply to damages that do not arise from specific, individual personal injuries. Thus, the District could not recover any money for salaries, benefits, etc. that are merely related to law enforcement or public safety functions in general.

As to causes of action that are *not* dependent upon the Strict Liability Act, the District's subrogation claims are not sufficiently pleaded as a matter of law, for different reasons.

There is a distinct facial defect in pleading that infects the reference to all three of the subrogation

---

[22] The Court is not impressed with the defendants' argument that plaintiffs' allegations under the "Healthcare Act" must fail because of the District's failure to plead that individual beneficiaries were given notice of their right to intervene, right to sue, etc. *See*D.C.Code § 4-606(b) (2000); D C. Mun. Regs. Title 29, § 1402.2. The failure to include a statement of such notice within the Complaint is not a fatal flaw, because it is not a precondition to filing suit. Nonetheless, the mere fact that the municipal regulations require such notice indirectly indicates that the District must at least reveal the names of the beneficiaries in the Complaint itself. *See* further discussion in text of *Seibels Bruce Group, Inc. v. Reynolds Tobacco Co., infra.*

statutes. The District has failed, indeed declined, to reveal in the Complaint the identities of the employees and citizens whose personal injury expenses were borne by the District.

The need to identify the underlying beneficiary or subrogor in this kind of lawsuit is so self-evident that scarcely anyone litigates this requirement. At least one other court, however, has dismissed an action for violating this very elemental requirement of pleading. The decision on point is *Seibels Bruce Group, Inc. v. Reynolds Tobacco Co.*, No. C-99-0593 MHP, 1999 U.S. Dist. LEXIS 15320 at *1 (N.D.Cal.1999)(Patel, C.J.). This case illustrates another plaintiff's fatal mistake in attempting to sue for injuries to a large mass of individuals without naming such persons and the corresponding bases for their lawsuits-doing so entirely outside the rigors of class action litigation. The published opinion in *Seibels* highlights the conceptual principles that establish why, as a threshold matter, a Complaint must explicitly identify each person who was actually injured and the basis on which that person would have had a claim against a particular defendant.

In *Seibels*, the plaintiff (the Seibels Bruce Group, Inc.) was an insurance company that had insured a number of asbestos companies that were sued for personal injuries arising from exposure to products containing asbestos. Among other claims, the plaintiff in *Seibels* sought to recover money it had paid out on behalf of its insured from various tobacco companies (under a theory that tobacco use had contributed to the diseases linked to asbestos).

Defendants in *Seibels* filed a motion to dismiss, pursuant to Rule 12(b)(6). Among other issues in the motion, defendants attacked the sufficiency of pleading of the plaintiff's subrogation claim. Defendants argued that

> Plaintiff has failed to satisfy the burden of pleading a claim for subrogation because the [plaintiff] fails to identify any specific settlements, judgments or lawsuits for which plaintiff paid claims.

Id. at *29.The plaintiff contended that "the facts defendants would require ... are only necessary in establishing plaintiff's burden of proof at trial."*Id.* This is essentially the position of the District in the present lawsuit.

The United States District Judge determined that "plaintiff must still comply with Federal Rule of Civil Procedure 8(a), which requires plaintiff to provide notice of the underlying facts to defendants so they may properly defend and answer the complaint. Plaintiff here has not done so."*Id.* at *31.

The District Judge recognized that defendants should not "confuse the requirements of properly pleading facts in a complaint with proof at trial."*Id.* at *30.Nonetheless, the District Court found that the level of specificity in the Complaint was legally insufficient:

> [P]laintiff does not provide defendants with notice of whose shoes they stand in, *i.e.*, for which of their insured companies are they asserting a claim of contribution.

> Additionally, although plaintiff asserts that it paid out almost $2.5 million, plaintiff does not provide any information on the breakdown of this money or when such money was paid. In its complaint, a subrogee 'should allege the facts on which the claim of subrogation is based; *e.g.*, that on a certain date plaintiff, acting under a legal necessity as ... insurer, discharged a debt or obligation owning from [defendant] to [subrogor].' 5. B.E. Witkin, Witkin California Procedure 863 (4th ed.1997). It is important to remember that a subrogation action is subject to the same statute of limitations that applies to the subrogor's action and begins to run at the same time. *See Commercial Union Assurance Co. v. City of San Jose,* 127 Cal.App.3d 730, 734, 179 Cal.Rptr. 814 (1982). Therefore, plaintiff must plead facts to give defendants notice of the running of the statute of limitations for the contribution or equitable indemnity claim; it has not done so.

Id. at *31-32 (footnotes omitted). Clearly, the concept of fair notice is a vital requirement of pleading a subrogation action. The District has utterly failed to provide such notice.

The District has pleaded itself into the same trap that required the dismissal of the lawsuit in *Seibels.*This case is not a class action, and it is clear that the subrogation statutes do not authorize class actions. The statutes speak, not in the plural, but only in the singular form of referring to "a

beneficiary" when describing procedures for filing suit. See further discussion, *infra,* as to Beneficiaries' Right to Sue. The District has run afoul of very basic pleading requirements, and this is not a close question.[23]

*2. Legal Deficiencies as to Underlying Beneficiaries' Right to Sue.*The claims under the Police and Firefighters Act and the Merit Personnel Act claims have a defect in that the public employees upon whose claims the District purports to base its suit are precluded from filing suits for injuries they sustain while performing their ordinary public duties as police officers, firefighters, etc. The District cannot possibly have any legal rights that are greater than the underlying rights of the public employees. If the law would preclude the individual lawsuits, the District cannot proceed with the same claim.

The District of Columbia Court of Appeals long ago recognized that a subrogee (here, the District) is subject to the same defenses that may be asserted against the underlying beneficiary. *Aetna Cas. & Sur. Co. v. Windsor,* 353 A.2d 684, 685 (D.C.1976),

---

[23] The District sought to amend the Complaint two times subsequent to the filing of the Motion to Dismiss, wherein this pleading deficiency was highlighted. Yet, the District has never filed at. Amended Complaint with enlarged factual allegations so as to moot this issue. The Court infers that the District is either unable to do so or that the District refuses to do so as a tactical choice of some kind. If the District has chosen the latter course, it did so at its peril. Ultimately, the reason for the deficiency is not important because this pivotal aspect of pleading the allegation simply is not there.

citing *Williams v. Globe Indem. Co.*, 507 F.2d 837, 839 (8th Cir.1974), *cert. denied*, 421 U.S. 948, 95 S.Ct. 1679, 44 L.Ed.2d 101 (1975)("The theory of subrogation is that the subrogee steps into the shoes of his subrogor. As such, he takes subject to all defenses which the third party could have asserted against the subrogor....").

As defendants point out, the law of the District of Columbia squarely prohibits public employees in law enforcement and safety professionals from suing persons who injure them in the line of duty (such as criminals). This legal principle is known as the "professional rescuers' doctrine." The Court of Appeals has observed,

> This doctrine bars those engaged in rescue work as a part of their employment from recovering damages for injuries sustained on the job as the result of the negligence of the person rescued.

Lee v. Luigi, Inc., 696 A.2d 1371, 1373-74 (D.C.1997). This rule "generally bars those whose business it is to prevent injury and save lives from tort recovery for injuries sustained from known hazards in the course of their work." *Young v. Sherwin-Williams Co., Inc.*, 569 A.2d 1173, 1175 (D.C.1990). The Court of Appeals of the District of Columbia has applied this doctrine to preclude suits by police officers, firefighters, and emergency medical technicians. *See Lee, supra* (police officer); *Young, supra* (firefighter), *Melton v. Crane Rental Co.*, 742 A.2d 875 (D.C.1999)(emergency medical technician). The Court of Appeals makes no distinction between

"known hazards" caused by criminals, tortfeasors, or any other miscreants.

The doctrine applies even if the injury in question was caused by intentional misconduct. Notably, the Court of Appeals has recognized that the core of the doctrine is the fact that law enforcement officers and other professional rescuers "voluntarily assume the risks of their employment ... In this analysis, therefore, the degree of culpability of the person who has created the hazard is irrelevant." *Young, supra,* at 1178. Consequently, the doctrine would certainly apply to the corporate defendants herein, as well as to the individual criminals (or other negligent persons) who actually discharge firearms that cause injury or death.

The District's reliance on the Strict Liability Act effects no diminution of the professional rescuer doctrine. The Act does not confer upon any public employee a new right of action that the employee otherwise does not have. It merely purports to remove the requirement of proving "fault" as an element of proof.

The District's claim filed pursuant to these three statutes is a broad categorical one that gathers together potentially thousands of beneficiaries as a group. Yet, the Complaint is not filed as a class action of any kind. More importantly, none of the subrogation statutes authorize the District to file class actions. By their own internal wording they consistently speak of "the beneficiary," so as to link the District's claim to a known individual. Without such identities being included in the Complaint, no defendant can file an intelligent admission or denial

that the discharge of one of its covered products is linked to injury of any particular person.

In the final analysis, the three subrogation statutes do not serve to absolve the District of the same pleading requirements that original beneficiaries would have to fulfill. An individual plaintiff would have to allege that he or she was injured in a particular manner or a particular incident, that certain medical services were required, that certain other losses were suffered, etc.[24] The only factor that changes-by resort to the subrogation statutes-is the identity of the party who must recite such facts on the face of the Complaint.

The District cannot persuasively argue, as it does, that it is entitled to file claims that would not survive this motion if they had been filed by an individual.

One point that is debated between the District and the defendants deserves clarification. The defendants contend that the District impermissibly attempts to maintain its Strict Liability claim by "aggregating" claims concerning reimbursement for health care provided to citizens and for various forms

---

[24] For example, no one would seriously argue that a plaintiff in a collision case should not be required to identify the date on which the collision occurred and the location of the incident. The District's Complaint is devoid of these kinds of bare bones facts. Indeed, nothing on the face of the Complaint gives enough information for a defendant to figure out if the allegation is timely made under the applicable statute of limitations (a matter that must be included in the Answer as a substantive defense).

of monetary relief and assistance provided to public employees who have been injured or killed by weapons covered by the Act. The plaintiffs have cited ample case law to defend the propriety and legal sufficiency of aggregating claims without having to recite the details of individual incidents in the same way that individual claims are described by Lawson and the other plaintiffs.

Upon reflection, the plaintiffs are only partly correct, because they inflate the nature of the point made by the defendant. The Court agrees with the District insofar as the District should not be required (within the Complaint itself) to describe the narrative details of individual *incidents* where public employee injuries are the subject. However, this has nothing to do with the requirement that the District at least allege in the Complaint that it has obtained pre-filing assignments from any employees on whose claim it is suing. If the District has complied with the law, this should not be any burden.

To be sure, some of the public employees whose expenses are the subject of the District's claim are not so-called "professional rescuers." The District's claim that relates to so-called "non-rescuers" is legally faulty at this early pleading stage because the underlying, individual claimant could never sue another person without revealing his or her own identity. A plaintiff cannot wear a mask. Thus, any entity that purports to file a derivative suit or its own suit based upon the injuries to another person should not be permitted to hide the basic source of the claim.

To underscore this point, it is useful to note that the "Health Care Assistance Act" is the statute under which the District seeks reimbursement for any medical care provided to any employee or citizen who has been injured by unspecified "gun violence" both in the past and in the future. Without drawing distinctions between its claims under Count I or Count II, the District seeks money damages for "health care costs and Medicaid expenses" that the District "has incurred and *will* incur" with respect to its citizens. Complaint at ¶ 97 (emphasis added).

The claim for unspecified *future* costs is not supportable under any of the subrogation statutes, which relate only to costs traceable to "a beneficiary" that already have been incurred. The District has provided no legal basis for asserting a claim to expenses that have not arisen at all. The Code itself speaks of the District's subrogation right as one that springs forth "[a]s soon as the District begins providing health-care assistance to a beneficiary...."D.C.Code § 4-602(b) (2001). Clearly, no judgment could be imposed against the defendants for speculative costs of the next several decades and beyond.

Count V: Collective Liability Theory of Damages

In Count V, the plaintiffs state the following:

> In addition to their individual liability, Defendants are collectively liable for the particular harms to Plaintiffs because Defendants' tortious conduct has collectively caused the circumstances that

> have caused the particular harms to Plaintiffs.

Complaint at ¶ 102. The defendants articulate why the theory of liability articulated in Count V is not legally supportable. Count V does not raise a separate and distinct substantive cause of action. Instead, it is a summary or projection of the conceptual framework under which the District expects to establish liability. The defendants have interpreted the plaintiffs' reference to "collective liability" as a reference to the more familiar term of art, "market share liability." There is no reason to do otherwise, and the parties have briefed the issue in this way.

Even if all the substantive causes of action had been pleaded sufficiently as against each defendant, the Complaint must be dismissed to the extent that plaintiffs seek anything other than individualized liability of each defendant. In other words, this case is not pleaded in such a way as to erect a lawful demand for damages based on the concept of "market share liability" or any other iteration of this theory. There is ample case law to demonstrate this point, and it totally favors the defendants. *See Hamilton v. Beretta, supra,* discussed further herein below.

The Complaint itself in Count V speaks only of obtaining damages on the basis of "collective liability." Having recognized the authorities cited by defendants that negate the applicability of this concept, the plaintiffs' response is vague. For example, in the Opposition to the Motion to Dismiss, Bryant Lawson argues that "even if discovery ultimately failed to reveal which Defendant made

the gun, Mr. Lawson would be entitled to proceed on the basis of alternative liability, market share liability, or another form of collective liability."Opp. at 57.

Lawson does not in any way define what he means by the term "alternative liability" or "another form" of collective liability. This response flounders in the face of the authorities relied upon by the defendants in the exploration of "market share liability." These phrases refer to the same thing. In the absence of argument from the District to the contrary, the Court presumes that the District makes the same argument as Lawson with respect to how it expects to obtain damages from the defendants. It is important for the Court to set forth why "market share" liability cannot apply in the instant litigation.

First, it is useful to note what is meant by the concept of "market share" liability and when a plaintiff will be permitted to resort to it. This was explained in rather straightforward fashion by the Court of Appeals of New York in *Hamilton v. Beretta, supra.*That Court stated:

> Market share liability provides an exception to the general rule that in common-law negligence actions, a plaintiff must prove that the defendant's conduct was a cause-in-fact of the injury. This Court first examined and adopted the market share theory of liability in *Hymowitz v. Eli Lilly & Co.* (73 N.Y.2d 487 [1989],*supra*). In *Hymowitz,* we held that plaintiffs injured by the drug DES were not

> required to prove which defendant manufactured the drug that injured them but instead, every manufacturer would be held responsible for every plaintiff's injury based on its share of the DES market. Market share liability was necessary in *Hymowitz* because DES was a fungible product and identification of the actual manufacturer that caused the injury to a particular plaintiff was impossible. The Court carefully noted that the DES situation was unique.

Hamilton v. Beretta, supra, at 1066-67.

The Court in *Hamilton* pointed out those factors that ordinarily should define when market share liability is properly invoked as a means of apportioning damages among a large group of defendants. As to the application in DES cases, the Court of Appeals of New York stated,

> Key to our decision were the facts that (1) the manufacturers acted in a parallel manner to produce an identical, generically marketed product; (2) the manifestations of injury were far removed from the time of ingestion of the product; and (3) the Legislature made a clear policy decision to review these time-barred DES claims.

Id. at 1067 (citation omitted).

Comparing the DES case rationale to the scenario reflected in the suits against the firearms companies,

the Court of Appeals of New York in *Hamilton* readily pinpointed the differences:

> Circumstances here are markedly different. Unlike DES, guns are not identical, fungible products. Significantly, it is often possible to identify the caliber and manufacturer of the handgun that caused injury to a particular plaintiff. Even more importantly-given the negligent marketing theory on which plaintiffs tried this case-plaintiffs have never asserted that the manufacturers' marketing techniques were uniform. Each manufacturer engaged in different marketing activities that allegedly contributed to the illegal handgun market in different ways and to different extents. Plaintiffs made no attempt to establish the relative fault of each manufacturer, but instead sought to hold them all liable based simply on market share.

Id. (footnotes omitted).[25] In the instant case, the Complaint in no way suggests that the defendants operated in a uniform fashion. In this regard, the same criticisms outlined in *Hamilton* apply to the Complaint herein. From one amended version to the other, the pleading has never changed on this subject.

---

[25] Many other jurisdictions have permitted market share liability to govern the litigation of DES cases. Those cases are too numerous to mention and would be repetitive.

Other state supreme courts have highlighted why it is virtually impossible to apply market share liability (or any similar group liability concept) to allegedly tortious use and manufacture of other kinds of non-fungible or non-generic products. The market share liability theory was disallowed in asbestos litigation. *See Gaulding v. Celotex* Corp., 772 S.W.2d 66, 71 (Tex.1989); *Goldman v. Johns-Manville Sales Corp.*, 33 Ohio St.3d 40, 514 N.E.2d 691, 700 (Ohio 1987). This theory of apportioning damages also has been disallowed with respect to suits involving harm from car batteries (even though the public might think of them as generic).*See York v. Lunkes,* 189 Ill.App.3d 689, 136 Ill.Dec. 954, 545 N.E.2d 478, 480 (Ill.App.Ct.1989). Application of market share liability has been ruled to be improper also with respect to suits concerning lead paint poisoning. *See Skipworth by Williams v.. Lead Indus. Ass'n, Inc.*, 547 Pa. 224, 690 A.2d 169, 173 (Pa.1997).

The explanation as to why market share liability cannot apply in suits such as the present one is synthesized so well by the Court of Appeals of New York in *Hamilton,* that this Court need not dwell on the point further.

In conclusion, the various causes of action pleaded in this case are facially insufficient as a matter of law. In each instance, this is not a close question.

WHEREFORE, it is by the Court this 16th day of December, 2002

ORDERED that the plaintiffs' Third Motion for Leave to Amend the Complaint is granted; and it is

FURTHER ORDERED that the Third Amended Complaint is hereby deemed filed as of January 20, 2000; and it is

FURTHER ORDERED that the Defendants' Motion for Judgment on the Pleadings is hereby granted; and it is

FURTHER ORDERED that the Clerk of the Court shall enter a separate judgment in favor of the defendants against all plaintiffs, as to all Counts.

APPENDIX F

ORDER OF THE DISTRICT OF COLUMBIA COURT OF APPEALS (JUNE 9, 2008)

DISTRICT OF COLUMBIA, *et al.*, Appellants,
v.

BERETTA U.S.A. CORPORATION, et al., Appellees.

Nos. 06-CY-721 & 06-CY-757

Appeals from the Superior Court of the
District of Columbia
No. CA-428-00

(Honorable Brook Hedge, Trial Judge)

Argued November 20, 2007
Decided January 10, 2008

Order Denying Petition for Rehearing, or Rehearing En Banc

BEFORE: Washington, Chief Judge; *Farrell, **Ruiz, *Reid, *Glickman, Kramer, Fisher, Blackbume-Rigsby, and Thompson, Associate Judges.

On consideration of appellants', District of Columbia, et al., petition for rehearing or rehearing en banc, appellants', Bryant Lawson, et al., petition for rehearing or rehearing en banc, appellees' response to the petition filed by District of Columbia, et al., intervenor's, United States, response to

appellants' petitions, appellees' letter pursuant to Rule 28(k), and appellants' letter in response to appellees' letter, it is

ORDERED by the merits division* that the petitions for rehearing are denied; and it appearing that no judge of this court has called for a vote on the petitions for rehearing en banc, it is

FURTHER ORDERED that the petitions for rehearing en banc are denied.

PER CURIAM

**Associate Judge Ruiz has recused herself from these cases.

APPENDIX G

U.S. CONST. ART. I § 8

Constitution of the United States

Article I. The Congress

Clause 3. Regulation of Commerce

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

APPENDIX H

U.S. CONST. AMEND. V

Constitution of the United States

Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX I

15 U.S.C. §§ 7901-7903

United States Code Annotated

Title 15. Commerce and Trade

PROTECTION OF LAWFUL COMMERCE IN ARMS

§ 7901. Findings; purposes

(a) Findings

Congress finds the following:

(1) The Second Amendment to the United States Constitution provides that the right of the people to keep and bear arms shall not be infringed.

(2) The Second Amendment to the United States Constitution protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms.

(3) Lawsuits have been commenced against manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended, which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals.

(4) The manufacture, importation, possession, sale, and use of firearms and ammunition in the United States are heavily regulated by Federal, State, and local laws. Such Federal laws include the Gun Control Act of 1968, the National Firearms Act, and the Arms Export Control Act.

(5) Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products that have been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.

(6) The possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system, erodes public confidence in our Nation's laws, threatens the diminution of a basic constitutional right and civil liberty, invites the disassembly and destabilization of other industries and economic sectors lawfully competing in the free enterprise system of the United States, and constitutes an unreasonable burden on interstate and foreign commerce of the United States.

(7) The liability actions commenced or contemplated by the Federal Government, States, municipalities, and private interest groups and others are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of

the common law. The possible sustaining of these actions by a maverick judicial officer or petit jury would expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States. Such an expansion of liability would constitute a deprivation of the rights, privileges, and immunities guaranteed to a citizen of the United States under the Fourteenth Amendment to the United States Constitution.

(8) The liability actions commenced or contemplated by the Federal Government, States, municipalities, private interest groups and others attempt to use the judicial branch to circumvent the Legislative branch of government to regulate interstate and foreign commerce through judgments and judicial decrees thereby threatening the Separation of Powers doctrine and weakening and undermining important principles of federalism, State sovereignty and comity between the sister States.

(b) Purposes

The purposes of this chapter are as follows:

(1) To prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended.

(2) To preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes,

including hunting, self-defense, collecting, and competitive or recreational shooting.

(3) To guarantee a citizen's rights, privileges, and immunities, as applied to the States, under the Fourteenth Amendment to the United States Constitution, pursuant to section 5 of that Amendment.

(4) To prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce.

(5) To protect the right, under the First Amendment to the Constitution, of manufacturers, distributors, dealers, and importers of firearms or ammunition products, and trade associations, to speak freely, to assemble peaceably, and to petition the Government for a redress of their grievances.

(6) To preserve and protect the Separation of Powers doctrine and important principles of federalism, State sovereignty and comity between sister States.

(7) To exercise congressional power under article IV, section 1 (the Full Faith and Credit Clause) of the United States Constitution.

§ 7902. Prohibition on bringing of qualified civil liability actions in Federal or State court

(a) In general

A qualified civil liability action may not be brought in any Federal or State court.

(b) Dismissal of pending actions

A qualified civil liability action that is pending on October 26, 2005, shall be immediately dismissed by the court in which the action was brought or is currently pending.

§ 7903. Definitions

In this chapter:

(1) Engaged in the business

The term "engaged in the business" has the meaning given that term in section 921(a)(21) of Title 18, and, as applied to a seller of ammunition, means a person who devotes time, attention, and labor to the sale of ammunition as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of ammunition.

(2) Manufacturer

The term "manufacturer" means, with respect to a qualified product, a person who is engaged in the business of manufacturing the product in interstate or foreign commerce and who is licensed to engage in business as such a manufacturer under chapter 44 of Title 18.

(3) Person

The term "person" means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, including any governmental entity.

(4) Qualified product

The term "qualified product" means a firearm (as defined in subparagraph (A) or (B) of section 921(a)(3) of Title 18), including any antique firearm (as defined in section 921(a)(16) of such title), or ammunition (as defined in section 921(a)(17)(A) of such title), or a component part of a firearm or ammunition, that has been shipped or transported in interstate or foreign commerce.

(5) Qualified civil liability action

(A) In general

The term "qualified civil liability action" means a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party, but shall not include--

(i) an action brought against a transferor convicted under section 924(h) of Title 18, or a comparable or identical State felony law, by a party directly harmed by the conduct of which the transferee is so convicted;

(ii) an action brought against a seller for negligent entrustment or negligence per se;

(iii) an action in which a manufacturer or seller of a qualified product knowingly violated a State

or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought, including--

(I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or

(II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of Title 18;

(iv) an action for breach of contract or warranty in connection with the purchase of the product;

(v) an action for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall

be considered the sole proximate cause of any resulting death, personal injuries or property damage; or

(vi) an action or proceeding commenced by the Attorney General to enforce the provisions of chapter 44 of Title 18 or chapter 53 of Title 26.

(B) Negligent entrustment

As used in subparagraph (A)(ii), the term " negligent entrustment" means the supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others.

(C) Rule of construction

The exceptions enumerated under clauses (i) through (v) of subparagraph (A) shall be construed so as not to be in conflict, and no provision of this chapter shall be construed to create a public or private cause of action or remedy.

(D) Minor child exception

Nothing in this chapter shall be construed to limit the right of a person under 17 years of age to recover damages authorized under Federal or State law in a civil action that meets 1 of the requirements under clauses (i) through (v) of subparagraph (A).

(6) Seller

The term "seller" means, with respect to a qualified product--

(A) an importer (as defined in section 921(a)(9) of Title 18) who is engaged in the business as such an importer in interstate or foreign commerce and who is licensed to engage in business as such an importer under chapter 44 of Title 18;

(B) a dealer (as defined in section 921(a)(11) of Title 18) who is engaged in the business as such a dealer in interstate or foreign commerce and who is licensed to engage in business as such a dealer under chapter 44 of Title 18; or

(C) a person engaged in the business of selling ammunition (as defined in section 921(a)(17)(A) of Title 18) in interstate or foreign commerce at the wholesale or retail level.

(7) State

The term "State" includes each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands, and any other territory or possession of the United States, and any political subdivision of any such place.

(8) Trade association

The term "trade association" means—

(A) any corporation, unincorporated association, federation, business league, professional or business organization not organized or operated for profit and

no part of the net earnings of which inures to the benefit of any private shareholder or individual;

(B) that is an organization described in section 501(c)(6) of Title 26 and exempt from tax under section 501(a) of such title; and

(C) 2 or more members of which are manufacturers or sellers of a qualified product.

(9) Unlawful misuse

The term "unlawful misuse" means conduct that violates a statute, ordinance, or regulation as it relates to the use of a qualified product.

APPENDIX J

D.C. Code. § 7-2551

District of Columbia Code

Title 15. Human Health Care and Safety
Subtitle J: Public Safety
Chapter 25. Firearms Control

ASSAULT WEAPONS MANUFACTURING STRICT LIABILITY

§ 7-2551.01. Definitions.

For the purposes of this unit, the term:

(1) "Assault weapon" includes the following weapons:

(A) Norinco, Mitchell, and Poly Technologies Avtomat Kalashnikovs (all models);

(B) Action Arms Israeli Military Industries UZI and Galil;

(C) Beretta AR-70 (SC-70);

(D) Colt AR-15 and CAR-15;

(E) Fabrique Nationale FN/FAL, FN/LAR, and FNC;

(F) MAC 10 and MAC 11;

(G) Steyr AUG;

(H) INTRATEC TEC-9; and

(I) Street Sweeper and Striker 12.

(2) "Handgun" means a firearm with a barrel less than 12 inches in length at the time of manufacture.

(3) "Dealer" and "importer" shall have the same meaning as in 18 U.S.C. § 921.

(4) "Machine gun" shall have the same meaning as in paragraph (10) of § 7- 2501.01.

(5) "Manufacturer" means any person in business to manufacture or assemble a firearm or ammunition for sale or distribution.

(6) "Law enforcement agency" means a federal, state, or local law enforcement agency, state militia, or an agency of the United States government.

(7) "Law enforcement officer" means any officer or agent of an agency defined in paragraph (6) of this section who is authorized to use a handgun or machine gun in the course of his or her work.

§ 7-2551.02. Liability.

Any manufacturer, importer, or dealer of an assault weapon or machine gun shall be held strictly liable in tort, without regard to fault or proof of defect, for all direct and consequential damages that arise from bodily injury or death if the bodily injury or death proximately results from the discharge of the assault weapon or machine gun in the District of Columbia.

§ 7-2551.03. Exemptions.

(a) No assault weapon originally distributed to a law enforcement agency or a law enforcement officer shall provide the basis for liability under this unit.

(b) No action may be brought pursuant to this unit by a person injured by an assault weapon while committing a crime.

(c) This section shall not operate to limit in scope any cause of action, other than that provided by this unit, available to a person injured by an assault weapon.

(d) Any defense that is available in a strict liability action shall be available as a defense under this unit.

(e) Recovery shall not be allowed under this unit for a self-inflicted injury that results from a reckless, wanton, or willful discharge of an assault weapon.

15

(2)

RECEIVED
DEC 23 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 08-545

IN THE

Supreme Court of the United States

BRYANT LAWSON, *et al.*,

Petitioners,

v.

BERETTA U.S.A. CORP., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

BRIEF IN OPPOSITION

THOMAS E. FENNELL
MICHAEL L. RICE
JONES DAY
2727 N. Harwood Street
Dallas, TX 75201
(214) 220-3939

PAUL R. REICHERT
(Counsel of Record)
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3939

Counsel for Respondent Colt's Manufacturing Co. LLC
(additional counsel inside cover)

December 23, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

LAWRENCE S. GREENWALD
LAWRENCE P. FLETCHER-HILL
CATHERINE A. BLEDSOE
GORDON, FEINBLATT, ROTHMAN, HOFFBERGER & HOLLANDER
233 East Redwood St.
Baltimore, MD 21202

Counsel for Respondents Beretta U.S.A. Corp. and Fabbrica d'Armi Pietro Beretta S.p.A.

JAMES P. DORR
SARAH L. OLSON
WILDMAN, HARROLD, ALLEN & DIXON LLC
225 West Wacker Drive, Suite 3000
Chicago, IL 60606
and
PAUL F. STRAIN
M. KING HILL, III
VENABLE LLP
575 7th Street, N.W.
Washington, DC 20004

Counsel for Respondent Sturm, Ruger & Co., Inc.

JOHN F. RENZULLI
CHRISTOPHER RENZULLI
SCOTT C. ALLAN
RENZULLI LAW FIRM, LLP
81 Main Street, Suite 508
White Plains, NY 10601
and
THOMAS V. MCCARRON
SEMMES, BOWEN & SEMMES
250 West Pratt Street
Baltimore, MD 21201

Counsel for Respondents Glock, Inc., Glock Ges.m.b.H., Hi-Point Firearms, H&R 1871, Inc., Century International Arms, Inc., and KBI, Inc.

TIMOTHY A. BUMANN
SMITH, GAMBRELL & RUSSELL, LLP
Promenade II, Suite 3100
1230 Peachtree St., NE
Atlanta, GA 30309
and
ROBERT E. SCOTT, JR.
SEMMES, BOWEN & SEMMES
250 West Pratt Street
Baltimore, MD 21201

Counsel for Respondents Taurus International Manufacturing, Inc. and Forjas Taurus, S.A.

CHARLES L. COLEMAN
HOLLAND & KNIGHT LLP
50 California Street,
28th Floor
San Francisco, CA 94111
and
DAVID S. BLACK
HOLLAND & KNIGHT LLP
1600 Tysons Boulevard,
Suite 700
McLean, VA 22102

Counsel for Respondents Heckler & Koch, Inc. and Heckler & Koch GmbH

MICHAEL BRANISA
MICHAEL J. ZOMCIK
BRANISA & ZOMCIK, P.C.
3900 Essex Lane,
Suite 730
Houston, TX 77027
and
PAUL L. PASCAL
ANTON M. WEISS
PASCAL & WEISS, PC
1008 Pennsylvania Ave., SE
Washington, DC 20003

Counsel for Respondent Phoenix Arms

WILLIAM M. GRIFFIN
FRIDAY, ELDREDGE & CLARK
2000 Regions Center
400 West Capitol
Little Rock, AR 72201-3493
and
THOMAS V. MCCARRON
SEMMES, BOWEN & SEMMES
250 West Pratt Street
Baltimore, MD 21201

Counsel for Respondent Browning Arms Co.

ROBERT L. JOYCE
LITTLETON JOYCE UGHETTA
PARK & KELLY LLP
One Manhattanville Rd.
Purchase, NY 10577
and
LAURA N. STEEL
WILSON, ELSER, MOSKOWITZ,
EDELMAN & DICKER
1341 G Street, NW
5th Floor
Washington, DC 20005

Counsel for Respondent Sigarms

JEFFREY S. NELSON
STACEY E. DEERE
SHOOK, HARDY & BACON
2555 Grand Blvd.
Kansas City, MO 64108
and
PAUL S. SCHLEIFMAN
SHOOK, HARDY & BACON
600 14th Street, NW
Suite 800
Washington, DC 20005

Counsel for Respondent
Smith & Wesson Corp.

CORPORATE DISCLOSURE STATEMENT

Beemiller, Inc. d/b/a Hi-Point Firearms has no parent corporations. There are no publicly held companies that own ten percent or more of its stock.

Beretta U.S.A. Corp. is majority owned by Beretta Holding S.p.A., which is not a publicly held company. There are no publicly held companies that own ten percent or more of Beretta U.S.A. Corp.'s stock.

Browning Arms Company's parent corporation is Browning, whose parent is BWA, Inc. There are no publicly held companies that own ten percent or more of Browning Arms Company's stock.

Century International Arms, Inc. has no parent corporations. There are no publicly held companies that own ten percent or more of its stock.

Colt's Manufacturing Company LLC, is a wholly-owned subsidiary of New Colt Holding Corp., which is not a publicly held company. There are no publicly held companies that own ten percent or more of Colt's Manufacturing Company LLC's stock.

Fabbrica d'Armi Pietro Beretta S.p.A., is a wholly-owned subsidiary of Beretta Holding S.p.A., which is not a publicly held company. There are no publicly held companies that own ten percent or more of Fabbrica d'Armi Pietro Beretta S.p.A.'s stock.

Forjas Taurus, S.A. has no parent corporations. There are no publicly held companies which own ten percent or more of Forjas Taurus, S.A.'s stock..

Glock Ges.m.b.H. has no parent corporations. There are no publicly held companies that own ten percent or more of Glock Ges.m.b.H.'s stock.

Glock, Inc. has no parent corporations. There are no publicly held companies that own ten percent or more of its stock.

Heckler & Koch, Inc., is a subsidiary of Heckler & Koch Beteiligungs, GmbH. There are no publicly held companies that own ten percent or more of Heckler & Koch, Inc.'s stock.

H&R 1871, Inc. has no parent corporations. There are no publicly held companies that own ten percent or more of its stock.

K.B.I., Inc. has no parent corporations. There are no publicly held companies that own ten percent or more of its stock.

Phoenix Arms has no publicly held corporate parents, subsidiaries or affiliates. There are no publicly held companies that own ten percent or more of its stock.

Sigarms, Inc. has no publicly held corporate parents, subsidiaries or affiliates. There are no publicly held companies that own ten percent or more of its stock.

Smith & Wesson Corp. is a wholly-owned subsidiary of Smith & Wesson Holding Corporation, which is a publicly held company. There are no publicly held companies that own ten percent or more of Smith & Wesson Corp.'s stock.

Sturm Ruger & Co., Inc. has no corporate parents and is a publicly held company. There are no publicly held companies that own ten percent or more of its stock.

Taurus International Manufacturing, Inc. has no publicly held corporate parents, subsidiaries or

affiliates. There are no publicly held companies that own ten percent or more of its stock.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES v

REASONS FOR DENYING THE WRIT 2

I. The Lower Court Joined Every Federal Appellate Court To Have Addressed The Issue In Ruling That Petitioners' Pending Tort Claims Did Not Give Rise To A Vested Right In The Absence Of A Final, Unappealable Judgment And Could Be Legislatively Modified, Consistent With Due Process, Subject Only To Rational Basis Review 4

II. Federal Constitutional Law Does Not Require That The Legislature Provide A Substitute Remedy When It Abrogates Or Modifies A Pending State Law Claim And, In Any Event, The Lower Court Correctly Found That The PLCAA Does Not Eliminate All Remedies 12

III. The Court Of Appeals Applied The Appropriate Standard In Reviewing Petitioners' Challenge To The PLCAA Under Substantive Due Process Principles 16

CONCLUSION 17

TABLE OF AUTHORITIES

Page

149 Madison Avenue Corp. v. Asselta,
331 U.S. 795 (1947) 5

Adams v. Hinchman,
154 F.3d 420 (D.C. Cir. 1998) 8

American Federation of Labor v. American Sash & Door Co.,
335 U.S. 538 (1949) 14

Arbour v. Jenkins,
903 F.2d 416 (6th Cir. 1990) 7

City of New York v. Beretta U.S.A. Corp.,
401 F. Supp. 2d 244 (E.D.N.Y. 2005),
aff'd, 524 F.3d 384 (2d Cir. 2008) 11

City of New York v. Beretta U.S.A. Corp.,
524 F.3d 384 (2d Cir. 2008) 2

In re Consolidated U.S. Atmospheric Testing Litigation,
820 F.2d 982 (9th Cir. 1987) 8, 9

Coombes v. Getz,
285 U.S. 434 (1932) 14

Deck v. Peter Romein's Sons, Inc.,
109 F.3d 383 (7th Cir 1997) 8

Ducharme v. Merrill-National Laboratories,
574 F.2d 1307 (5th Cir. 1978) 12

Duke Power Co. v. Carolina Environmental Study Group, Inc.,
438 U.S. 59 (1978) 4, 12

Eastern Enterprises v. Apfel,
524 U.S. 498 (1998) 9, 10

Ettor v. City of Tacoma,
228 U.S. 148 (1913) 14

Gavin v. Branstad,
122 F.3d 1081 (8th Cir. 1997) 6

Hammond v. United States,
786 F.2d 8 (1st Cir. 1986) 7, 9

Honeywell, Inc. v. Minnesota Life & Health Insurance Guaranty Association,
110 F.3d 547 (8th Cir. 1997) 14

Ileto v. Glock,
421 F. Supp. 2d 1274
(C.D. Cal. 2006), *app. docketed* 2, 10, 11

International Brotherhood of Teamsters, Local 695 v. Vogt, Inc.,
354 U.S. 284 (1957) 14

In re Jones Truck Lines, Inc.,
57 F.3d 642 (8th Cir. 1995) 8

Kyle Railways, Inc. v. Pacific Administration Services, Inc.,
990 F.2d 513 (9th Cir. 1993) 12

Landgraf v. USI Film Products,
511 U.S. 244 (1994).....5

Logan v. Zimmerman Brush Co.,
455 U.S. 422 (1982).....13, 16, 17

Lyon v. Agusta S.p.A.,
252 F.3d 1078 (9th Cir. 2001).....8

Martinez v. California,
444 U.S. 277 (1980).....13

Mullane v. Central Hanover Bank & Trust Co.,
339 U.S. 306 (1950).....16

New York Central R.R. Co. v. White,
243 U.S. 188 (1917).....4

Pension Benefit Guaranty Corp. v. R.A. Gray & Co.,
467 U.S. 717 (1984).....9

Plaut v. Spendthrift Farm, Inc.,
514 U.S. 211 (1995).....5, 6

Salmon v. Schwarz,
948 F.2d 1131 (10th Cir. 1991).....7

Sowell v. American Cyanamid Co.,
888 F.2d 802 (11th Cir. 1989).....7

In re TMI,
89 F.3d 1106 (3d Cir. 1996).....7, 9

Town of Castle Rock, Col. v. Gonzales,
545 U.S. 748 (2005).....13

Truax v. Corrigan,
257 U.S. 312 (1921) 14

Tulsa Professional Collection Services, Inc. v. Pope,
485 U.S. 478 (1988) 13, 16

United States v. Schooner Peggy,
5 U.S. 103 (1801) 5

Usery v. Turner Elkhorn Mining Co.,
428 U.S. 1 (1976) 9

STATE CASES

Montgomery v. Daniels,
340 N.E.2d 444 (N.Y. 1975) 13

FEDERAL STATUTES

Protection of Lawful Commerce In Arms Act,
15 U.S.C. §§ 7901-7903 ..... *passim*

Food Donation Act, 42 U.S.C. § 1791 14

General Aviation Act, Pub. L. No. 103-298, 108 Stat. 1552-54 14

Y2K Act, 15 U.S.C. §§ 6601-17 15

STATE STATUTES

Assault Weapons Manufacturing Strict Liability Act, D.C. Code § 7-2551.01 *et seq* 2, 15

BRIEF IN OPPOSITION

Respondents Beemiller, Inc. d/b/a Hi-Point Firearms, Beretta U.S.A. Corp., Browning Arms Company, Century International Arms, Inc., Colt's Manufacturing Company LLC, Fabbrica d'Armi Pietro Beretta S.p.A., Forjas Taurus, S.A., Glock Ges.m.b.H., Glock, Inc., Heckler & Koch, Inc., H&R 1871, Inc., K.B.I., Inc., Phoenix Arms, Sigarms, Inc., Smith & Wesson Corp., Sturm Ruger & Co., Inc., and Taurus International Manufacturing, Inc., ("Respondents") respectfully request that the Court deny the petition for a writ of certiorari filed by Bryant Lawson, *et. al* ("Petitioners") for three fundamental reasons:

First, the District of Columbia Court of Appeals applied the same rule of law followed by every federal Court of Appeals in holding that Petitioners' pending tort claims, which had not ripened into final, unappealable judgments, are not vested rights and can be legislatively modified consistent with due process.

Second, no constitutional principle requires Congress to provide a substitute remedy when it abrogates or modifies a pending state law claim and, in any event, the Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901-7903 ("PLCAA" or the "Act") does not eliminate all remedies.

Third, the Court of Appeals applied the correct legal standard in reviewing Petitioners' substantive due process challenge to the PLCAA and properly upheld the Act.

In short, Petitioners have presented no compelling reason for certiorari.

REASONS FOR DENYING THE WRIT

In a unanimous opinion dated January 10, 2008, the District of Columbia Court of Appeals held that the federal Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901 – 7903 (2005) (the "PLCAA" or "the Act") preempts and bars Petitioners' claims against firearm manufacturer defendants under the District's Assault Weapons Manufacturing Strict Liability Act, D.C. Code § 7-2551.01 *et seq.* (the "Strict Liability Act"). In doing so, the court joined two federal courts in rejecting plaintiffs' challenges to the constitutionality of the PLCAA. *See City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008)[1]; *Ileto v. Glock*, 421 F. Supp. 2d 1274, 1298-1304 (C.D. Cal. 2006) (appeal pending).

With respect to Petitioners' due process challenge, the court held that the PLCAA is an example of legislation "adjusting the burdens and benefits of economic life" that is subject to rational basis review, and that Petitioners failed to meet their burden of showing that Congress acted arbitrarily or irrationally in enacting it. App. 18a –21a. The court rejected Petitioners' argument that their cause of action under the Strict Liability Act is a vested property right that cannot be retroactively abridged by the PLCAA. *Id.* at 21a – 27a. In doing so, the court joined this Court and scores of other courts across the country in holding that a person does not have a vested right in a cause of action absent a final, unappealable judgment, and the government can modify or abolish pending claims through retroactive

[1] The plaintiff in *City of New York* has filed a separate petition, on different grounds, for a writ of certiorari to this Court. *See* Case No. 08-530.

legislation, consistent with due process, as long as the legislation is reasonably related to a legitimate governmental purpose. *Id.*

In their petition for a writ of certiorari, Petitioners continue to press their out-dated "vested rights" theory, arguing that the PLCAA is unconstitutional because (1) it retroactively eliminates Petitioners' pending tort claims, and (2) it provides no countervailing benefit or *quid pro quo* for the rights eliminated. The petition is without merit. Petitioners have no vested right in their tort claims absent a final, unappealable judgment, and there is no constitutional requirement that the legislature provide a substitute remedy whenever it preempts state law. Congress exercised its valid authority under the Commerce Clause through rational means in enacting the PLCAA, which is plainly constitutional.

There is no reason for this Court to grant review of this case. There is no conflict on "an important question" between lower courts or between the holding of the court below and the decisions of this Court. Supreme Court Rule 10. The Court of Appeals' analysis is consistent with many decisions by this Court and federal appellate courts upholding the right of Congress to enact legislation modifying, abolishing, or otherwise affecting pending claims, subject only to rational basis review. The PLCAA easily passes muster under that standard.

I. The Lower Court Joined Every Federal Appellate Court To Have Addressed The Issue In Ruling That Petitioners' Pending Tort Claims Did Not Give Rise To A Vested Right In The Absence Of A Final, Unappealable Judgment And Could Be Legislatively Modified, Consistent With Due Process, Subject Only To Rational Basis Review

Petitioners argue that Congress cannot exercise its authority under the Commerce Clause to retroactively abolish pending tort claims without running afoul of the Due Process Clause of the Fifth Amendment. Petition at 10-15. Petitioners' argument is contrary to settled law, over which there is no conflict between the Circuits. As the Court of Appeals properly held, a person does not have a vested right in a cause of action absent a final, unappealable judgment, and the government can modify or abolish pending claims through retroactive legislation, consistent with due process, as long as the legislation is reasonably related to a legitimate governmental purpose.

The principle that legal claims do not automatically give rise to vested rights has deep roots in this Court's jurisprudence. *See, e.g., New York Cent. R.R. Co. v. White*, 243 U.S. 188, 198 (1917) ("No person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit."); *Duke Power Co. v. Carolina Environ'l Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978) ("Our cases have clearly established that a person has no property, no vested interest, in any rule of the common law. The Constitution does not forbid the creation of new rights, or the abolition of

old ones recognized by the common law, to attain a permissible legislative object, despite the fact that otherwise settled expectations may be upset thereby.") (internal citations and quotation marks omitted).

This rule is a corollary to the principle that a "court should apply the law in effect at the time it renders its decision, even though that law was enacted after the events that gave rise to the suit," *Landgraf v. USI Film Products*, 511 U.S. 244, 273 (1994) (citation and internal quotation marks omitted) – a principle applied by this Court over two hundred years ago in the case of *United States v. Schooner Peggy*, 5 U.S. 103 (1801).[2]

As the lower court recognized (App. 23a – 24a), this Court recently reaffirmed that principle, and cited *Schooner Peggy* approvingly, in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), in explaining the difference between pending claims (which are subject

---

[2] In *Schooner Peggy*, Chief Justice Marshall, writing for a unanimous Court, reversed a judgment condemning a French vessel seized on American waters because an intervening treaty, first enacted while the case was on appeal, provided for the restoration of captured property "not yet *definitively* condemned." *Id.* at 107. "[T]he court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside." *Id.* at 110. *See also 149 Madison Avenue Corp. v. Asselta*, 331 U.S. 795 (1947), *modifying* 331 U.S. 199 (1947) (after affirming judgment for overtime pay due plaintiffs under Fair Labor Standards Act, remanding case, on timely motion for rehearing, for consideration of effect of newly enacted Portal-to-Portal Act which gave employers good-faith defenses to back overtime pay suits under Fair Labor Standards Act).

to modification through retroactive legislation) and final, unappealable judgments (which are not):

> When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted and must alter the outcome accordingly. *See United States v. Schooner Peggy*, 1 Cranch 103, 2 L.Ed. 49 (1801); *Landgraf v. USI Film Products*, 511 U.S. 244, 273-280, 114 S.Ct. 1483, 1501-1505, 128 L.Ed.2d 229 (1994) . . . . It is the obligation of the last court in the hierarchy that rules on the case to give effect to Congress's latest enactment, even when that has the effect of overturning the judgment of an inferior court, since each court, at every level, must 'decide according to existing laws.' *Schooner Peggy*, *supra*, 1 Cranch, at 109. Having achieved finality, however, a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable to *that very case* was something other than what the courts said it was.

Id. at 226-27. *See also Gavin v. Branstad*, 122 F.3d 1081, 1091 (8th Cir. 1997) ("The doctrine of vested rights . . . like the separation-of-powers doctrine expounded in *Plaut*, depends on the existence of a final judgment . . . [and] is really only the due process analogue of the separation-of-powers doctrine that prevents Congress from reopening final judgments.").

Applying these principles, courts across the country have rejected challenges, similar to the one

advanced by Petitioners here, that federal statutes modifying or abrogating pending state tort claims violate due process. *See, e.g., Sowell v. American Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir. 1989) (retroactive application of Federal Employees Liability Reform and Tort Compensation Act ("FELRTCA") to employee's claim on appeal was constitutional, even though it resulted in setting aside plaintiff's judgment: "The fact that the statute is retroactive does not make it unconstitutional as a legal claim affords no definite or enforcible [sic] property right until reduced to final judgment.") (citations omitted); *Salmon v. Schwarz*, 948 F.2d 1131, 1142-44 (10th Cir. 1991) (upholding retroactive application of FELRTCA to pending tort claim); *Arbour v. Jenkins*, 903 F.2d 416, 420 (6th Cir. 1990) (same); *Hammond v. United States*, 786 F.2d 8, 12 (1st Cir. 1986) (retroactive application of Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1985, 42 U.S.C. § 2212, which resulted in dismissal of widow's lawsuit against government contractor for wrongful death and loss of consortium arising from her husband's death from radiation exposure did not violate due process: "Because rights in tort do not vest until there is a final, unreviewable judgment, Congress abridged no vested rights of the plaintiff by enacting § 2212 and retroactively abolishing her cause of action in tort."); *In re TMI*, 89 F.3d 1106, 1113 (3d Cir. 1996) (retroactive application of Price-Anderson Amendment requiring application of Pennsylvania's statute of limitations to all actions arising from Three Mile Island nuclear accident did not violate due process even though it resulted in dismissal of plaintiffs' lawsuits filed in Mississippi

under longer statute of limitations); *Lyon v. Agusta S.p.A.*, 252 F.3d 1078, 1086-87 (9th Cir. 2001) (application of statute of repose in General Aviation Revitalization Act barring product liability action against aircraft manufacturer based on date of delivery of aircraft did not violate due process, even though Act was enacted after accident for which plaintiffs were suing). Indeed, every federal appellate court that has addressed the issue has concluded that there is no vested right in a cause of action absent a final, unappealable judgment.[3] The lower court properly applied the same rule here. App. 22a – 27a.

The lower court correctly held that where, as here, Congress has used its authority under the Commerce Clause to "adjust[] the burdens and benefits of economic life, [the legislation] come[s] to the Court with a presumption of constitutionality, and . . . the burden is on one complaining of a due process violation to establish that the legislature has acted in

---

[3] In addition to the cases cited above, *see, e.g., In re Consolid. U.S. Atmospheric Testing Litig.*, 820 F.2d 982, 989 (9th Cir. 1987) (a tort claim "is inchoate and affords no definite and enforceable property right until reduced to final judgment"); *In re Jones Truck Lines, Inc.*, 57 F.3d 642, 651 (8th Cir. 1995) ("Causes of action are . . . not fully vested interests until reduced to final judgment."); *Adams v. Hinchman*, 154 F.3d 420, 424 (D.C. Cir. 1998) (retroactive application of federal statute to bar plaintiffs' pending claims for unpaid overtime compensation under Fair Labor Standards Act did not violate due process because "'a cause of action . . . affords no definite or enforceable property right until reduced to a final judgment'") (quoting *Adams v. Bowsher*, 946 F. Supp. 37, 43 (D.D.C. 1996)); *Deck v. Peter Romein's Sons, Inc.*, 109 F.3d 383 (7th Cir 1997) (retroactive application of AWPA workers' compensation exclusivity amendment to bar plaintiff's pending wrongful death claim did not violate due process).

an arbitrary and irrational way." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). Moreover,

> [the] strong deference accorded legislation in the field of national economic policy is no less applicable when that legislation is applied retroactively. Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches.

Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 729 (1984).[4]

---

[4] In keeping with these cases, courts have uniformly considered due process challenges to retroactive legislation affecting pending tort claims under the rational basis standard. *See, e.g., In re TMI*, 89 F.3d at 1113 (Price-Anderson Amendment of 1988); *In re Consol. U.S. Atmospheric Testing Litig.*, 820 F.2d at 990-91 (Department of Energy National Security and Military Applications of Nuclear Authorization Act of 1985); *Hammond*, 786 F.2d at 13-14 (same).

Petitioners attempt to modify the rational basis standard by quoting selectively from *Pension Benefit Guaranty Corporation* and *Eastern Enterprises v. Apfel*, 524 U.S. 498, 528-29 (1998). Petition at 11, 12. While the Court in *Pension Benefit Guaranty Corporation* noted that "the enactment of retroactive statutes confined to short and limited periods required by the practicalities of producing national legislation ... is a customary congressional practice," 467 U.S. at 731 (quotation marks omitted), the Court did not impose a time requirement or limit constitutional approval to those statutes whose retroactive application is "confined to short and limited periods" as Petitioners contend. Similarly, while the Court in *Apfel* noted that its decision "left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the

The PLCAA easily passes muster under this standard. As the PLCAA's legislative findings make clear, Congress enacted the PLCAA to eliminate the unreasonable burden to interstate commerce posed by certain lawsuits against firearm manufacturers and sellers and to ensure the continued viability of an industry that arms the country's military and police, on the one hand, while at the same time preserving legitimate tort claims by persons injured by defectively made firearms and illegal firearm sales, on the other hand. *See* 15 U.S.C. §§ 7901(a)(6) & (8). These are legitimate legislative purposes; barring pending and future "qualified civil liability actions" is a rational means of furthering those goals.

A "qualified civil liability action" imposes unreasonable burdens on lawful interstate commerce in firearms and threatens the continued viability of the firearm industry. It does this by imposing crippling litigation costs on the defendants and by attempting to regulate, sometimes in conflict with existing federal laws, through court-ordered money damages and injunctive relief, the way manufacturers, distributors, and dealers design, market, and sell their products in interstate commerce. Contrary to Petitioners' bald assertion otherwise, prohibiting such lawsuits – both pending and future ones – is a logical means of eliminating those burdens. *See Ileto*, 421 F. Supp. 2d at 1302 & n.34 ("The legislative history contains repeated

---

(continued...)

liability, and the extent of that liability is substantially disproportionate to the parties' experience," *Apfel*, 524 U.S. at 528-29, there is nothing in that opinion that suggests the same rule would apply to retroactive *immunity* as opposed to *liability*.

references about the dire consequences of these 'predatory' lawsuits.") (citing Congressional Record references to economic and national security concerns created by lawsuits against firearm makers); *see also id.* ("[A]s the district court in *Beretta* has already concluded, 'there is a rational basis for Congress' determination that the Act was necessary to protect [the firearms] industry.'") (quoting *City of New York v. Beretta U.S.A. Corp.*, 401 F. Supp. 2d 244, 287 (E.D.N.Y. 2005), *aff'd*, 524 F.3d 384 (2d Cir. 2008)).

Petitioners argue that the PLCAA is irrational because it prohibits common law claims while preserving identical statutory claims and dictates to states which branch of government can determine state law. Petition at 13-15. This argument is based on a fundamental mischaracterization of the PLCAA. The PLCAA merely prohibits claims against firearm manufacturers and sellers for harm resulting from the unlawful or criminal misuse of their products, and specifies certain exceptions to that general prohibition. Some of the exceptions preserve common law claims, *see, e.g.*, § 7903(5)(A)(iv) (breach of contract or warranty), and some preserve statute-based claims, *see, e.g.*, § 7903(5)(A)(i) (violation of 18 U.S.C. § 924(h) or comparable State felony law) and § 7903(5)(A)(iii) (violation of a state or federal statute applicable to the sale or marketing of a firearm). When Congress has the authority to preclude *all* claims against firearm manufacturers and sellers engaged in interstate commerce, prohibiting all but the particular types of actions that Congress deems appropriate does not make the statute irrational or unconstitutional. In short, Petitioners' argument that the PLCAA is irrational is based on a false premise. The lower court correctly held that

Petitioners failed to meet their burden of showing that Congress acted irrationally in passing the PLCAA.

II. Federal Constitutional Law Does Not Require That The Legislature Provide A Substitute Remedy When It Abrogates Or Modifies A Pending State Law Claim And, In Any Event, The Lower Court Correctly Found That The PLCAA Does Not Eliminate All Remedies

Petitioners argue that the PLCAA is unconstitutional because it eliminates Petitioners' rights and remedies without providing any alternative compensation scheme or substitute benefit. Petition at 15-20. Although this Court has not explicitly ruled on the issue, it has long expressed skepticism that there is any constitutional requirement to provide a substitute remedy: "[I]t is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy." *Duke Power Co.*, 438 U.S. at 88 & n.32.

Lower courts have expressed similar skepticism. *See, e.g., Kyle Railways, Inc. v. Pacific Admin. Services, Inc.*, 990 F.2d 513, 518-19 (9th Cir. 1993) (rejecting argument that, by preempting any state law causes of action while failing to provide substitute federal causes of action, ERISA left "gap" in law and violated due process: "[S]uch a gap is legitimate if it is the result intended by Congress.") (quoting *Howard v. Parisian, Inc.*, 807 F.2d 1560, 1565 (11th Cir. 1987)); *Ducharme v. Merrill-Nat'l Lab.*, 574 F.2d 1307, 1310 (5th Cir. 1978) (upholding Swine Flu Act against due process challenge and

noting that "[l]egislation has even been upheld where no remedy was substituted in place of the cause of action that was taken away"); *Montgomery v. Daniels*, 340 N.E.2d 444, 453-54 (N.Y. 1975) (in upholding constitutionality of New York no-fault automobile accident compensation law, expressing skepticism that due process requires *quid pro quo*, but not reaching the issue: "Many States have abolished common-law causes of action by statute without providing any substitute remedy at all, e.g., the common-law right of a guest in an automobile to recover for the negligence of his host, or the common-law right of a party to sue in tort or contract for breach of promise to marry or for alienation of affections.") (citations and footnotes omitted).

By contrast, Petitioners rely on a number of *state* court decisions holding that certain *state* statutes violated *state* constitutional provisions by retroactively modifying or eliminating pending claims. Petition at 17-19. Petitioners' reliance is misplaced because *federal constitutional law*, not state law, determines whether a property interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause. *See Town of Castle Rock, Col. v. Gonzales*, 545 U.S. 748, 756-57 (2005). Under federal constitutional law, there is no vested interest in a cause of action until it is successfully pursued to a final, unappealable judgment.

Petitioners also cite *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982), *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 485 (1988), *Martinez v. Calif.*, 444 U.S. 277, 281-82 (1980) and other cases for the proposition that a cause of action

is a species of property protected by due process. Petition at 19. But the unremarkable proposition that a cause of action is a property right protected by due process does not answer the more pertinent questions at issue here – namely, how much protection that right is due and under what circumstances the right may be abridged. None of those cases supports Petitioners' argument that Congress cannot modify or eliminate a pending tort claim unless it also provides a substitute remedy.[5]

Several recently enacted federal tort reform statutes do not provide any offsetting benefits for the common law causes of action they abrogate, at least to the parties directly affected by the loss of those claims. *See, e.g.*, General Aviation Act, Pub. L. No. 103-298, 108 Stat. 1552-54 (18-year statute of repose for claims against aircraft manufacturers); Food

---

[5] Petitioners' reliance on the *Lochner*-era cases of *Ettor v. City of Tacoma*, 228 U.S. 148 (1913) and *Coombes v. Getz*, 285 U.S. 434 (1932) (Petition at 20), is also misplaced, as these cases have been effectively overruled by the modern cases reviewing substantive due process challenges to economic legislation under a rational basis test. *See Honeywell, Inc. v. Minn. Life & Health Ins. Guar. Ass'n*, 110 F.3d 547, 554 (8th Cir. 1997). Their reliance on *Truax v. Corrigan*, 257 U.S. 312 (1921), Petition at 17, 18-19, is misplaced for the same reason. *See Int'l Bhd. of Teamsters, Local 695 v. Vogt, Inc.*, 354 U.S. 284, 287-88 (1957) ("The considerations that underlay that case [*Truax*] soon had to yield, through legislation and later through litigation, to the persuasiveness of undermining facts"). While *Truax* was the product of an "attitude which regarded any legislative encroachment upon the existing economic order as infected with unconstitutionality," the tide later shifted to an increased deference to legislative judgment. *Am. Fed'n of Labor v. Am. Sash & Door Co.*, 335 U.S. 538, 543-44 (1949) (Frankfurter, J., concurring). Judicial deference to legislative judgments in the area of economic regulation remains the law today.

Donation Act, 42 U.S.C. § 1791 (limiting liability for donors of food); Y2K Act, 15 U.S.C. §§ 6601-17 (capping damages against small businesses in Y2K actions). Nevertheless, these statutes provide benefits that extend to society as a whole. Here, the benefits of protecting innocent manufacturers and sellers of firearms from abusive lawsuits and preserving the viability of an industry that arms the nation's military and law enforcement personnel is more than adequate to justify the PLCAA under the applicable rational basis review.

Moreover, as the lower court recognized (App. 26a n.8), the PLCAA does not deprive Petitioners of all remedies, as they contend. Under the PLCAA, Petitioners and other victims of gun violence may still sue the gun traffickers and criminals directly responsible for their injuries. They also remain free to sue manufacturers and sellers where one of the six exceptions to the PLCAA applies. These civil remedies are in addition to the panoply of remedies available to the District of Columbia under the criminal code against violators of its laws. Far from stripping Petitioners of any right to redress, the PLCAA bars a narrow range of claims that seek to blame manufacturers and sellers for third-parties' criminal misuse of their non-defective products.[6]

---

[6] As the Court of Appeals held, Petitioners' claim under the Strict Liability Act is precisely this sort of claim. The Strict Liability Act imposes liability on manufacturers and sellers of covered firearms "without regard to fault or proof of defect" whenever a criminal discharges one of those firearms in the District, causing bodily injury or death to another. Under the Strict Liability Act, the manufacturer's conduct is irrelevant: the manufacturer is liable even if its sale or marketing of the firearm at issue was perfectly lawful and non-negligent and even if the firearm was non-defective.

III. The Court Of Appeals Applied The Appropriate Standard In Reviewing Petitioners' Challenge To The PLCAA Under Substantive Due Process Principles

Petitioners contend that the lower court confused the standards applicable to procedural and substantive due process challenges in considering Petitioners' challenge to the PLCAA. However, it is Petitioners, and not the lower court, who have confused the two standards and the Court of Appeals' ruling.

In their briefs below, Petitioners cited *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) and other *procedural* due process cases[7] as support for their substantive due process challenge – namely, their argument that there is a vested right to pursue a state law tort claim which Congress cannot retroactively abolish. However, these cases do not support Petitioners' contention. In *Logan*, the State of Illinois terminated the plaintiff's cause of action for employment discrimination because a state official failed to comply with a statutorily mandated procedure. *Id.* at 424. This Court held that the State's action violated the plaintiff's right to *procedural* due process, not *substantive* due process. *Id.* at 433.

Here, the PLCAA directs the dismissal of Petitioners' lawsuit, not because of any procedural default but, rather, because Congress passed a substantive law barring such claims. As this Court stated in *Logan*, a legislature "remains free to create

---

[7] *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Tulsa Prof. Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988).

substantive defenses or immunities for use in adjudication – or to eliminate its statutorily created causes of action altogether – just as it can amend or terminate its welfare or employment programs." *Id.* at 432. While such actions might "deprive the plaintiffs [or beneficiaries of the welfare and employment programs] of a protected property interest," it is not a deprivation "without due process" because, in each case, "the legislative determination provides all the process that is due." *Id.* at 432-33 (citations omitted).

The lower court in this case properly concluded that (1) any *procedural* due process challenge advanced by Petitioners failed because "the legislative determination provides all the process that is due" and (2) Petitioners' *substantive* due process challenge failed because the PLCAA's retroactive application is supported by a legitimate legislative purpose furthered by rational means. App. 22a – 27a.

CONCLUSION

The petition should be denied.

DECEMBER 23, 2008

Respectfully submitted,

LAWRENCE S. GREENWALD
LAWRENCE P. FLETCHER-HILL
CATHERINE A. BLEDSOE
GORDON, FEINBLATT, ROTHMAN, HOFFBERGER & HOLLANDER
233 East Redwood St.
Baltimore, MD 21202

Counsel for Respondents Beretta U.S.A. Corp. and Fabbrica d'Armi Pietro Beretta S.p.A.

PAUL R. REICHERT
(COUNSEL OF RECORD)
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001
and
THOMAS E. FENNELL
MICHAEL L. RICE
JONES DAY
2727 N. Harwood Street
Dallas, TX 75201-1515

Counsel for Respondent Colt's Manufacturing Company LLC

JAMES P. DORR
SARAH L. OLSON
WILDMAN, HARROLD, ALLEN & DIXON LLC
225 West Wacker Drive, Suite 3000
Chicago, IL 60606
and
PAUL F. STRAIN
M. KING HILL, III
VENABLE LLP
575 7th Street, N.W.
Washington, DC 20004

Counsel for Respondent Sturm, Ruger & Co., Inc.

CHARLES L. COLEMAN
HOLLAND & KNIGHT LLP
50 California Street, 28th Floor
San Francisco, CA 94111
and
DAVID S. BLACK
HOLLAND & KNIGHT LLP
1600 Tysons Boulevard, Suite 700
McLean, VA 22102

Counsel for Respondents Heckler & Koch, Inc. and Heckler & Koch GmbH

JOHN F. RENZULLI
CHRISTOPHER RENZULLI
SCOTT C. ALLAN
RENZULLI LAW FIRM, LLP
81 Main Street, Suite 508
White Plains, NY 10601
and
THOMAS V. MCCARRON
SEMMES, BOWEN & SEMMES
250 West Pratt Street
Baltimore, MD 21201

Counsel for Respondents Glock, Inc., Glock Ges.m.b.H., Hi-Point Firearms, H&R 1871, Inc., Century International Arms, Inc., and KBI, Inc.

MICHAEL BRANISA
MICHAEL J. ZOMCIK
BRANISA & ZOMCIK, P.C.
3900 Essex Lane,
Suite 730
Houston, TX 77027
and
PAUL L. PASCAL
ANTON M. WEISS
PASCAL & WEISS, PC
1008 Pennsylvania Ave., SE
Washington, DC 20003

Counsel for Respondent Phoenix Arms

JEFFREY S. NELSON
STACEY E. DEERE
SHOOK, HARDY & BACON
2555 Grand Blvd.
Kansas City, MO 64108
and
PAUL S. SCHLEIFMAN
SHOOK, HARDY & BACON
600 14th Street, NW
Suite 800
Washington, DC 20005

Counsel for Respondent Smith & Wesson Corp.

TIMOTHY A. BUMANN
SMITH, GAMBRELL & RUSSELL, LLP
Promenade II, Ste. 3100
1230 Peachtree St., NE
Atlanta, GA 30309
and
ROBERT E. SCOTT, JR.
SEMMES, BOWEN & SEMMES
250 West Pratt Street
Baltimore, MD 21201

Counsel for Respondents Taurus International Manufacturing, Inc. And Forjas Taurus, S.A.

WILLIAM M. GRIFFIN
FRIDAY, ELDREDGE & CLARK
2000 Regions Center
400 West Capitol
Little Rock, AR 72201
and
THOMAS V. MCCARRON
SEMMES, BOWEN & SEMMES
250 West Pratt Street
Baltimore, MD 21201

Counsel for Respondent Browning Arms Co.

ROBERT L. JOYCE
LITTLETON JOYCE UGHETTA
PARK & KELLY LLP
One Manhattanville Rd.
Purchase, NY 10577
and
LAURA N. STEEL
WILSON, ELSER, MOSKOWITZ
EDELMAN & DICKER
1341 G Street, NW
5th Floor
Washington, DC 20005

Counsel for Respondent
Sigarms

Supreme Court, U.S.
FILED

No. 08-545

In the Supreme Court of the United States

BRYANT LAWSON, ET AL., PETITIONERS

v.

BERETTA U.S.A. CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

EDWIN S. KNEEDLER
Acting Solicitor General
Counsel of Record
MICHAEL F. HERTZ
Acting Assistant Attorney General
MARK B. STERN
MICHAEL S. RAAB
SAMANTHA L. CHAIFETZ
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the Protection of Lawful Commerce in Arms Act, 15 U.S.C. 7903(5)(A)(iii), violates the Fifth Amendment by requiring the dismissal of certain pending suits against firearm manufacturers and distributors.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 2
Argument 4
Conclusion 9

TABLE OF AUTHORITIES

Cases:

City of N.Y. v. *Beretta U.S.A. Corp.*:
524 F.3d 384 (2d Cir.), petition for cert. pending, No. 08-530 (filed Oct. 20, 2008) 5
401 F. Supp. 2d 244 (E.D.N.Y. 2005), aff'd in part and rev'd in part, 524 F.3d 384 (2d Cir.), petition for cert. pending, No. 08-530 (filed Oct. 20, 2008) ... 6
Duke Power Co. v. *Carolina Envtl. Study Group Inc.*, 438 U.S. 59 (1978) 7
Ileto v. *Glock, Inc.*, 421 F. Supp. 2d 1274 (C.D. Cal. 2006) 6
Landgraf v. *USI Film Prods.*, 511 U.S. 244 (1994) ... 4, 5, 8
Logan v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982) 8
New York Central R.R. v. *White*, 243 U.S. 188 (1917) 7
PBGC v. *R.A. Gray & Co.*, 467 U.S. 717 (1984) 5
Truax v. *Corrigan*, 257 U.S. 312 (1921) 7, 8

Constitution and statutes:

U.S. Const.:
Amend. V 4, 5, 8
Due Process Clause 4, 8

Constitution and statutes—Continued: Page

Amend. X 5
Amend. XIV (Due Process Clause) 8
Price-Anderson Act, 42 U.S.C. 2210 (1976) 7
Protection of Lawful Commerce in Arms Act, 15 U.S.C. 7901 *et seq.* 2
15 U.S.C. 7901(a)(6) 2
15 U.S.C. 7901(b)(1) 4
15 U.S.C. 7902(b) 2, 5
15 U.S.C. 7903(5)(A) 3
15 U.S.C. 7903(5)(A)(iii) 3, 4
Assault Weapon Manufacturing Strict Liability Act of 1990, D.C. Code §§ 7-2551.01 *et seq.* (2008) 2
§ 7-2551.02 2

In the Supreme Court of the United States

No. 08-545

BRYANT LAWSON, ET AL., PETITIONERS

v.

BERETTA U.S.A. CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals (Pet. App. 1a-36a) is reported at 940 A.2d 163. The opinion of the Superior Court of the District of Columbia (Pet. App. 37a-81a) is unreported but is available at 2006 WL 1892023.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on January 10, 2008. A petition for rehearing was denied on June 9, 2008 (Pet. App. 255a-256a). On September 2, 2008, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including October 23, 2008, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

STATEMENT

1. In January 2000, the District of Columbia and an individual harmed by gun violence brought the present action against the major manufacturers, importers, and distributors of handguns in the United States. Pet. App. 84a, 137a-139a. As relevant here, petitioners alleged that respondents were liable under the District of Columbia's Assault Weapon Manufacturing Strict Liability Act of 1990 (SLA), D.C. Code §§ 7-2551.01 *et seq.* (2008), which imposes strict liability on "[a]ny manufacturer, importer, or dealer of an assault weapon or machine gun * * * for all direct and consequential damages that arise from bodily injury or death * * * [that] proximately results from the discharge of the assault weapon or machine gun in the District of Columbia." D.C. Code § 7-2551.02 (2008).

2. On October 26, 2005, while petitioners' action was pending, the Protection of Lawful Commerce in Arms Act (PLCAA), 15 U.S.C. 7901 *et seq.*, was enacted into law. Congress enacted the PLCAA after finding that suits against firearm manufacturers and distributors for the unlawful acts of third parties threatened to place "an unreasonable burden on interstate and foreign commerce of the United States." 15 U.S.C. 7901(a)(6). The Act provides that any "qualified civil liability action that is pending" on the date of its enactment "shall be immediately dismissed by the court in which the action was brought or is currently pending." 15 U.S.C. 7902(b). The Act defines a "qualified civil liability action" as "a civil action * * * brought by any person against a manufacturer or seller of a [firearm distributed in interstate or foreign commerce] * * * for damages, punitive damages, injunctive or declaratory relief, abatement, * * * or other relief, resulting from the criminal or unlawful

misuse of [such firearm] by the person or a third party." 15 U.S.C. 7903(5)(A).

Respondents moved to dismiss petitioners' complaint pursuant to the PLCAA. Petitioners argued that their action fell within the PLCAA's "predicate exception," Pet. App. 6a, because it alleged that a "manufacturer or seller of [firearms transported in interstate or foreign commerce] knowingly violated a State or Federal statute applicable to the sale or marketing of [such firearms], and the violation was a proximate cause of the harm for which relief is sought." 15 U.S.C. 7903(5)(A)(iii). In the alternative, petitioners challenged the PLCAA's constitutionality on several grounds. The United States therefore intervened to defend the PLCAA"s constitutionality, without taking any position on whether the Act applies to the present action.

3. On May 22, 2006, the District of Columbia Superior Court granted respondents' motion to dismiss. Pet. App. 38a-81a. The court held that petitioners' action does not fall within the PLCAA's predicate exception, because that exception is "limited to state statutes regulating the manner in which firearms are sold or marketed, and not statutes that are merely capable of being applied to the result of the sale or marketing of firearms." *Id.* at 59a. The court then rejected petitioners' various constitutional challenges. *Id.* at 60a-81a.

4. On January 10, 2008, the District of Columbia Court of Appeals unanimously affirmed. Pet. App. 1a-36a. First, the court held that petitioners' action does not fall within the PLCAA's predicate exception, because the SLA "imposes no duty on firearms manufacturers or sellers to operate in any particular manner or according to any standards of care or reasonableness." *Id.* at 11a. The SLA is therefore different from the

types of statutes Congress specifically exempted. *Id.* at 12a. The court further reasoned that allowing strict-liability actions under the SLA would be inconsistent with Congress's requirement that the statutory violation proximately cause the harm, *ibid.* (citing 15 U.S.C. 7903(5)(A)(iii)), and its stated intention to prohibit causes of action against firearm manufacturers and distributors based on the criminal or unlawful misuse of firearms by third parties, *id.* at 13a (citing 15 U.S.C. 7901(b)(1)).

Second, the court rejected petitioners' various constitutional challenges. Pet. App. 14a-36a. As relevant here, the court held that the PLCAA does not violate the substantive component of the Due Process Clause of the Fifth Amendment, because "[a]ctions such as the [petitioners'] that are still pending and have not been reduced to judgment raise no concern with applying a 'new provision [that] attaches new legal consequences to events completed before its enactment.'" *Id.* at 26a (quoting *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 270 (1994)) (brackets in original; emphasis omitted).

ARGUMENT

The unanimous decision of the District of Columbia Court of Appeals upholding the constitutionality of the PLCAA is correct and does not conflict with any decision of this Court or of any court of appeals. Further review is therefore not warranted.

1. The court of appeals concluded that the PLCAA does not violate the substantive component of the Due Process Clause of the Fifth Amendment, because petitioners' cause of action had not been reduced to a final judgment. Pet. App. 23a. That decision is not in conflict with any decision of any lower court. Indeed, lower

courts have repeatedly rejected claims that the modification or abrogation of a pending state law cause of action by a federal statute violates federal due process.[1] *Id.* at 24a-25a. In any event, no lower court has held that the PLCAA is unconstitutional under the Fifth Amendment.

Petitioners discuss (Pet. 10-11) the concerns with retroactive legislation. But that is why this Court has imposed "a requirement that Congress first make its intention clear" in order to "ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 268 (1994). Petitioners do not attempt to argue that Congress failed to make its intention clear in the PLCAA: the Act expressly applies to any "qualified civil liability action that is pending" on the date of its enactment. 15 U.S.C. 7902(b). Nor do petitioners argue that Congress lacked a rational basis for applying the PLCAA to both pending and future suits. And it is in any event clear that the PLCAA's application to pending suits is "justified by a rational legislative purpose." *PBGC* v. *R.A. Gray & Co.*, 467 U.S. 717, 730 (1984). As the District of Columbia Court of Appeals explained, "Congress was especially

---

[1] The only other court of appeals to consider a similar question has concluded that the PLCAA does not violate principles of separation of powers, because "the Act permissibly sets forth a new rule of law that is applicable both to pending actions and to future actions." See *City of N.Y.* v. *Beretta U.S.A. Corp.*, 524 F.3d 384, 395 (2d Cir.), petition for cert. pending, No. 08-530 (filed Oct. 20, 2008). Petitioners in *City of New York* contend that the PLCAA is unconstitutional only under the Tenth Amendment, not the Fifth Amendment. Pet. 9-19, *City of N.Y.* v. *Beretta U.S.A. Corp.*, No. 08-530 (filed Oct. 20, 2008). Moreover, they have not sought review of the Second Circuit's separation-of-powers analysis.

concerned with '[l]awsuits [that] have been commenced' seeking 'money damages and other relief' against manufacturers and sellers of firearms for harms caused by the misuse of their products by others, including criminals, 15 U.S.C. § 7901(a)(3), and with the threat to interstate commerce of thus 'imposing liability on an entire industry for harm . . . solely caused by others.' *Id.* § 7901(a)(6)." Pet. App. 20a (brackets in original; emphasis omitted); see *Ileto* v. *Glock, Inc.*, 421 F. Supp. 2d 1274, 1302 (C.D. Cal. 2006) ("Although one may disagree with Congress' predictions [about the effect of unchecked lawsuits], one cannot credibly argue that the Act's retroactive provision does not further a legitimate legislative purpose."); *City of N.Y.* v. *Beretta U.S.A. Corp.*, 401 F. Supp. 2d 244, 287 (E.D.N.Y. 2005) ("[T]here is a rational basis for Congress' determination that the Act was necessary to protect [the firearms] industry."), aff'd in part and rev'd in part, 524 F.3d 384 (2d Cir.), petition for cert. pending, No. 08-530 (filed Oct. 20, 2008).

Petitioners do argue (Pet. 13-15) that Congress lacked a rational basis for distinguishing between causes of action arising under state statutes and those arising under state common law. But the court of appeals did not address whether the PLCAA's predicate exception applies only to "statutory-based actions" and not "common-law actions." Pet. 13-14. It had no reason to address that issue, because petitioners' only current cause of action is based on a statute, the District of Columbia's SLA. Pet. 6. Petitioners' other claims, based on negligence and public nuisance, are no longer at issue. They were previously dismissed by the court of appeals, and this Court denied review. Pet. App. 82a-133a, cert. denied, 546 U.S. 928 (2005).

2. Petitioners contend that Congress is required to provide a "substitute remedy" when it "abolishe[s] a common-law cause of action." Pet. 15-16. Again, that contention does not apply, because petitioners are not pressing a common law cause of action in this case. But in fact the PLCAA's exceptions, including its predicate exception, do allow various causes of action against firearm manufacturers and distributors. For that reason, as the court of appeals recognized, there is no need to consider whether petitioners have been deprived of all potential remedies in violation of substantive due process. Pet. App. 20a, 26a.

Nor would petitioners' proposed substitution requirement be consistent with modern preemption doctrine. Congress could not effectively preempt state law causes of action if it were forced to leave alternative remedies in their stead. In *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), this Court expressed doubt that the Due Process Clause "requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy." *Id.* at 88. If that proposition was doubtful in a case in which the federal statute (the Price-Anderson Act, 42 U.S.C. 2210 (1976)) was designed to establish a federal cause of action, it is even more doubtful in this case, in which the federal statute (the PLCAA) is designed to preempt state causes of action.[2] Moreover, as the court of ap-

---

[2] Petitioners assert (Pet. 17) that two of this Court's decisions, *New York Central Railroad* v. *White*, 243 U.S. 188 (1917), and *Truax* v. *Corrigan*, 257 U.S. 312 (1921), support their proposed substitution requirement. Neither is apposite. *White* upheld the state statute without deciding whether alternative remedies were necessary, 243 U.S. at 201, and *Truax* invalidated a state statute on the ground that it was "a pure-

peals observed, "federal appellate courts have repeatedly rejected claims, similar to [petitioners'] here, that federal statutes modifying or abrogating pending state tort law actions violate due process rights by depriving litigants of their right to proceed." Pet. App. 24a-25a. In any event, there is no reason to resolve that question here, where the court of appeals' decision neither addresses it nor is in conflict with any decision of this Court or of any federal court of appeals.

3. Finally, petitioners assert (Pet. 19) that their cause of action is a species of property protected by the Due Process Clause of the Fourteenth Amendment even prior to final judgment. However, Congress's decision to preempt petitioners' cause of action was not "without due process" because "the legislative determination provides all the process that is due." *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 432-433 (1982). So long as Congress is clear, it may "attach[] new legal consequences to events completed before its enactment," *Landgraf*, 511 U.S. at 270, and bar pending actions as a rational way "to give comprehensive effect to a new law [that it] consider[ed] salutary," *id.* at 268. That is what Congress did here in the PLCAA, and the decision below upholding the constitutionality of Congress's action does not warrant further review.

---

ly arbitrary or capricious exercise of [the State's] power," 257 U.S. at 329. As discussed earlier, the PLCAA has a rational legislative purpose. See pp. 5-6, *supra*. Petitioners also cite (Pet. 17-18) a handful of state *court* decisions interpreting state constitutions. None of those decisions purports to interpret the Due Process Clause of the Fifth Amendment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

EDWIN S. KNEEDLER
Acting Solicitor General
MICHAEL F. HERTZ
Acting Assistant Attorney General
MARK B. STERN
MICHAEL S. RABB
SAMANTHA L. CHAIFETZ
Attorneys

FEBRUARY 2009

120

NO. 08 – 545

Supreme Court, U.S.
FILED
FEB 19 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BRYANT LAWSON, *ET AL.*,

Petitioners,

v.

BERETTA USA CORPORATION, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

REPLY BRIEF FOR PETITIONERS

JONATHAN E. LOWY
BRIAN J. SIEBEL
DANIEL R. VICE
BRADY CENTER TO PREVENT GUN VIOLENCE LEGAL ACTION PROJECT
1225 EYE STREET, N.W.
SUITE 1100
WASHINGTON, DC 20005
(202) 289-7319

ROBERT S. PECK*
VALERIE M. NANNERY
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
777 Sixth Street, N.W.
Suite 520
Washington, DC 20001
(202) 944-2874
robert.peck@cclfirm.com

*Counsel of Record
Counsel for Petitioners

TABLE OF CONTENTS

I. RETROACTIVE LEGISLATION REQUIRES GREATER JUSTIFICATIONS THAN ARE SUFFICIENT TO SUSTAIN PROSPECTIVE LEGISLATION 2

II. DUE PROCESS REQUIRES AN OFFSETTING BENEFIT 6

III. THE LOWER COURTS NEED GUIDANCE ON THE LIMITS OF THE ADAGE THAT "LEGISLATIVE DETERMINATION PROVIDES ALL THE PROCESS THAT IS DUE" 7

IV. CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985) 7

Coombes v. Getz, 285 U.S. 434 (1932) 4

Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978) 6

Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) 5

Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) 8

Ettor v. City of Tacoma, 228 U.S. 148 (1913) 4

General Motors Corp. v. Romein, 503 U.S. 181 (1992) 2

Goss v. Lopez, 419 U.S. 565 (1975) 7

Honeywell, Inc. v. Minnesota Life & Health Insurance Guaranty Ass'n, 110 F.3d 547 (8th Cir. 1997) 4

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 7

Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1 (1978) 7

Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717 (1984) 2

United States v. Lopez, 514 U.S. 549 (1995) 4

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976).....2, 3, 8

Constitutional Provisions

U.S. CONST. ART. I § 8.....1, 3

Statutes

PLCAA, 15 U.S.C. §§ 7901-7903.....1, 5

42 U.S.C. 2210 (1976).....6

D.C. Code §§ 7-2551.01-7-2551.03. 7

Other Authorities

H.R. Rep. No. 109-124 (2005) 8

RESTATEMENT (2D) OF TORTS 7

THE FEDERALIST NO. 44 (James Madison) (J. Cooke ed. 1961).....5, 9

REPLY BRIEF FOR PETITIONER

Rather than join the issues presented in the Petition, both the Respondents and the United States present a traditional Commerce Clause defense[1] of Congress's authority to enact economic legislation. Petitioners do not dispute that basic underlying authority. Moreover, there is no constitutional bar against Congress revising, limiting, or abrogating a cause of action it created. None of that, however, has any significance in this case, which challenges the constitutionality of the Protection of Lawful Commerce in Arms Act (PLCAA), Pub. L. No. 109-92, 119 Stat. 2096 (2005) (codified at 15 U.S.C. §§ 7901 to 7903).

Instead, the Petition is focused on a different and much narrower question: "whether Congress may use its Commerce Clause authority to regulate transactions that took place years before Congress acted," which actions were originally authorized under state law. Pet. 8. That question requires more justification than prospective economic legislation. Neither the Respondents nor the United States attempt to offer that necessary justification.

[1] U.S. CONST. ART. I § 8 provides Congress with authority to "regulate Commerce."

I. RETROACTIVE LEGISLATION REQUIRES GREATER JUSTIFICATIONS THAN ARE SUFFICIENT TO SUSTAIN PROSPECTIVE LEGISLATION

This Court has recognized that "[r]etroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992). As a result, this Court has held that the "retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976). *Usery* fully refutes Respondents' approach, which relies entirely on justifications that relate to the prospective application of the PLCAA.

Despite the deference generally accorded "legislation in the field of national economic policy," this Court still requires that "the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means." *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). *See also id.* at 733 ("retrospective civil legislation may offend due process if it is 'particularly "harsh and oppressive"' . . . that standard does not differ from the prohibition against arbitrary and irrational legislation.")

Petitioners' claim is that there is no "legitimate legislative purpose furthered by rational means" in economic legislation that regulates conduct that has already taken place. Instead, as

Usery makes plain, different and more compelling justifications must be offered than Respondents and the United States propound when they explain why the Commerce Clause authorizes Congress to enact commercial legislation as a general proposition.

Through the PLCAA, Congress sought to immunize Respondents from certain lawsuits challenging marketing and distribution practices of gun manufacturers and dealers that result in guns being used in criminal activity, unless authorized by a state legislature. It did not, however, stop there. It reached back in time to immunize past conduct that was already the subject of lawsuits that had not yet reached final disposition. It is undisputed that all of the acts and events that gave rise to Petitioners' claims took place more than nine years ago, when Petitioners filed this lawsuit. It is also undisputed that the lawsuit preceded the PLCAA by more than five years. Petitioners challenge whether the PLCAA's unique form of congressional time travel falls within its Commerce Power. At a minimum, it requires far more justification than a wave of a wand that denominates the PLCAA as economic legislation and thus within the Commerce Clause. *See* Brief in Opposition of Colt's Manufacturing Co. LLC, *et al.* 8-11 (hereinafter "Colt Br."). It is also no answer, as the United States argues, that the justification for retroactive application derives entirely from the clear expression of congressional intent to operate retrospectively. *See* Brief for Federal Respondent in Opposition 5 (hereinafter "U.S. Br.").

Petitioners contend that there is no necessary commercial nexus between events that have already taken place and any congressional attempt to regulate it today. *See United States v. Lopez,* 514

U.S. 549, 549 (1995) (holding that courts engage in a "case-by-case inquiry, that the [activity] in question has the requisite nexus with interstate commerce.").

Moreover, contrary to its characterization by Respondent, Petitioners do not rest their cause on a simplistic claim that they have a vested cause of action that may not be affected by legislation enacted prior to a final judgment.[2] Colt Br. 4-12. Instead, as the Petition makes plain, Petitioners assert that the PLCAA derives its authority solely from the power of Congress "to Regulate commerce . . . among the several States," even though a legislative body cannot "Regulate commerce" with respect to transactions that were completed before the legislation was enacted. Pet. 2. Its retroactive application thus lacks a legitimate legislative purpose furthered by rational means in cases like this one that have been pending based on transactions that took place long in the past.

---

[2] It is unnecessary to get into a debate with both Respondents over the extent to which a cause of action is a vested property right for certain purposes. Whether or not it is does not control the question presented about the rationality of regulating commerce that took place in the past. Nonetheless, it is worthwhile pointing out that Respondents' claim that *Coombes v. Getz*, 285 U.S. 434 (1932) and *Ettor v. City of Tacoma*, 228 U.S. 148 (1913), have been "effectively overruled," Colt Br. 14 n.5, was denied by the case they cite for that proposition, *Honeywell, Inc. v. Minnesota Life & Health Ins. Guar. Ass'n*, 110 F.3d 547 (8th Cir. 1997). In *Honeywell*, the Eighth Circuit acknowledged that neither *Coombes* nor *Ettor* have been overruled, 110 F.3d at 553, and the Eighth Circuit had no authority to overrule these decisions.

Ordering that a nine-year-old case pending in the courts for five years prior to enactment of the Act and raising liability tied to events that preceded the 2000 filing of that lawsuit be "immediately dismiss[ed]," *see* 15 U.S.C. § 7902(a), (b), does not "regulate Commerce." It is precisely that kind of attempt to reach back in time that caused James Madison to express the public's weariness with the "fluctuating policy" that arises from "sudden changes and legislative interferences, in cases affecting personal rights." THE FEDERALIST NO. 44, at 301 (J. Cooke ed. 1961). It has no place in our Commerce Clause jurisprudence.

Respondents ask this court to ignore its own precedents that hold legislation "unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and if the extent of that liability is substantially disproportionate to the parties' experience." Colt Br. 9-10 n.4, citing *Eastern Enterprises v. Apfel*, 524 U.S. 498, 528-29 (1998). To avoid that holding, Respondents reason that "nothing in that opinion . . . suggests the same rule would apply to retroactive *immunity* as opposed to *liability*." *Id.* (emphasis in original). Respondents take too narrow a view of *Apfel's* holding, one that logic does not support. At its core, *Apfel* stands for the proposition that it is fundamentally unfair to impose an unanticipated and retroactive financial burden on a party after the fact. In many instances, that financial burden will comprise a new liability, as it did in *Apfel*. In other instances, the financial burden will be on a plaintiff by granting a responsible party immunity, as PLCAA accomplishes. There is no analytical difference between a retrospective liability and a retrospective

immunity. They are opposite sides of the same coin and equally unconstitutional.

II. DUE PROCESS REQUIRES AN OFFSETTING BENEFIT

The United States contends that the PLCAA did not eviscerate all claims against gun manufacturers and distributers, U.S. Br. 7, which is true, but it did wipe out all of the claims these plaintiffs have without an offsetting benefit. The fact that other plaintiffs, past or future, may have some claims against these defendants does nothing to support the PLCAA's constitutionality. The United States further states that if the proposition requiring an offsetting benefit "was doubtful" in the challenge to the Price-Anderson Act, 42 U.S.C. 2210 (1976), "it is even more doubtful in this case," where the federal statute "preempt[s] state causes of action." U.S. Br. 7. The argument, however, is built on an unstable platform. This Court specifically left the question of whether a reasonable alternative remedy was necessary in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), because it determined the Price-Anderson Act did indeed "provide a reasonably just substitute." *Id.* at 88. Specifically, it found the statute's requirement that the nuclear industry waive all defenses, thus becoming subject to strict liability, and Congress's willingness to act as a guarantor against liability in excess of the $560 million ceiling provided a sufficient *quid pro quo*. *Id.* at 65, 66-67, 85-87.

It is also of no moment that Petitioners' claims are grounded in a statute rather than the common law, despite the United States' argument to the contrary. U.S. Br. 7. The District of Columbia

Assault Weapon manufacturing Strict Liability Act of 1990, D.C. Code §§ 7-2551.01 *et seq.*, which provides the basis for this action, has an equitable basis and is consistent with common-law tort principles concerning abnormally dangerous activities. *See* Restatement (2d) of Torts §§ 519, 520. Moreover, as the Court of Appeals recognized in this case, Petitioners' statutory claims constitute a substitution for their common-law negligence claims. Pet. App. 91-100a. Even if the foregoing was not a valid basis to invoke the offsetting benefit requirement when a statutory cause of action is eviscerated, this Court has repeatedly recognized that due process still applies. *See, e.g., Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532 (1985) (civil service retention rights); *Memphis Light, Gas & Water Div. v. Craft,* 436 U.S. 1 (1978) (utility services); *Goss v. Lopez,* 419 U.S. 565 (1975) (public education). The need for an adequate substitute remedy applies equally to Petitioners' claims as they would to common-law negligence.

Ultimately, Respondents concede that this Court has never answered the question directly. Colt Br. 12. The time has come for this Court to resolve this issue of great national importance.

III. THE LOWER COURTS NEED GUIDANCE ON THE LIMITS OF THE ADAGE THAT "LEGISLATIVE DETERMINATION PROVIDES ALL THE PROCESS THAT IS DUE"

As did the court below, Pet. App. 22a, the United States' opposition rests, in part, on the simple adage that the "legislative determination provides all the process that is due." U.S. Br. 8, citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432-33 (1982).

It makes no attempt to rebut or engage the conflict among the circuits and other holdings of this Court that deny such singular reliance. As the Petition detailed, this Court and others have recognized that at least a rational basis inquiry must be made, even to legislation labeled economic in nature when it operates retrospectively. *See* Pet. 21-23. *See also Usery v. Turner Elkhorn Mining Co.*, 428 U.S. at 17. Such an inquiry necessarily embraces more than deference to the process of legislative determination.

Finally, the United States defends the PLCAA as another instance in which Congress merely attached "new legal consequences" to existing laws, such as requiring a jury trial or even adding actual damages in addition to loss of pay only. U.S. Br. 8. In such circumstances, however, Congress is amending one of its own laws. Here, Congress amended no existing federal law. *See* H.R. Rep. No. 109-124, at 41 (2005) (the PLCAA "makes no changes to preexisting law."). And, of course, Congress has no authority to amend state law. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). It thus attached no legal consequences to an existing law. Moreover, the kind of changes in the law effectuated by the PLCAA, abrogation of a right of action granted under state law, amounts to a change of consequences of a different magnitude that cannot be so simply dismissed.

If the PLCAA is upheld, Congress will have the authority to wipe out any state cause of action retroactively against any defendant or set of defendants who can achieve sufficient political support, on the theory that eliminating potential past liability constitutes a proper regulation of interstate commerce. It is precisely that type of

possibility that Madison warned about in FEDERALIST NO. 44. The commerce power should not extend that far.

IV. CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

February 19, 2009

ROBERT S. PECK*
VALERIE M. NANNERY
CENTER FOR
CONSTITUTIONAL
LITIGATION, P.C.
777 Sixth Street, N.W.
Suite 520
Washington, DC 20001
(202) 944-2874
robert.peck@cclfirm.com

JONATHAN E. LOWY
BRIAN J. SIEBEL
DANIEL R. VICE
BRADY CENTER TO PREVENT
GUN VIOLENCE
LEGAL ACTION PROJECT
1225 EYE STREET, N.W.
SUITE 1100
WASHINGTON, DC 20005
(202) 289-7319

Counsel for Petitioners
*Counsel of Record